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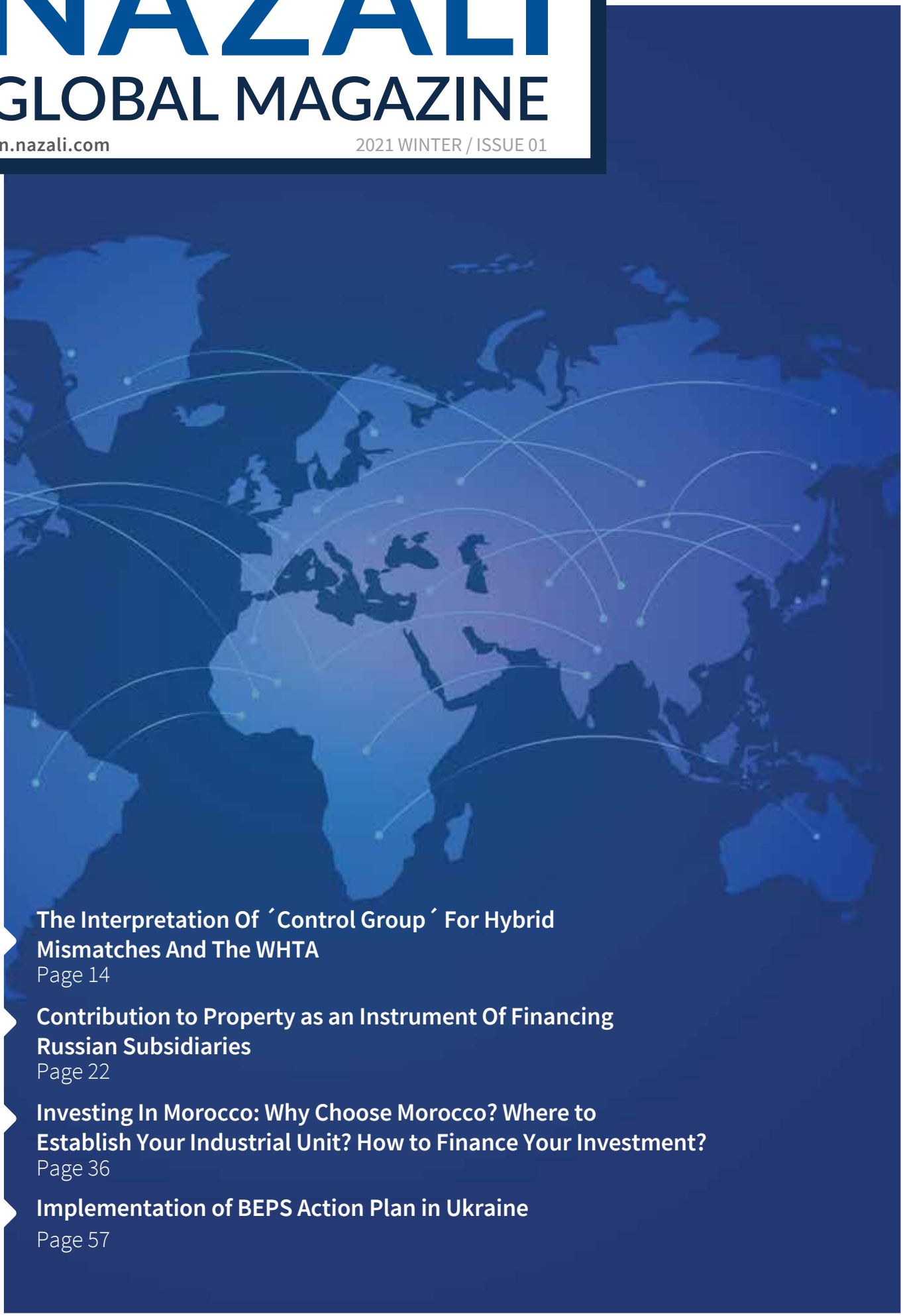

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PREFACE

Dear Friends,

We all go through a turbulent period, with all its bitterness and uncertainties. In this period, we realize how important it is to be supportive to each other with all the responsibility and awareness of being a family. Even in the harsh times NAZALI successfully managed continuing its devoted work towards its business partners. Taking this opportunity, we would like to thank all members of the NAZALI family once again for their efforts.

Despite the difficult period NAZALI invested in expansion of its business activities to other jurisdictions, with the main rationale to give the (existing) business partners the opportunity to grow along in the jurisdictions where NAZALI is present. Herewith, the business partners will benefit from the synergy advantages and simultaneously guaranteed of the same devotion of work, services and support. All to be provided as a one-stop-shop, under one roof.

This first edition of NAZALI GLOBAL MAGAZINE has a dual purpose. One the one hand, we are taking the opportunity to proudly introduce our foreign offices. At the same time we would like to share interesting articles with you, which have been prepared by the foreign offices with care and dedication.

The content of NAZALI GLOBAL MAGAZINE is jurisdictionally divided, where our professionals of each jurisdiction focused on one legal and one tax article. In case of any questions, please feel free to get in touch with our professionals.

We hope to meet you again in our next edition of NAZALI GLOBAL MAGAZINE

Sincerely regards,
NAZALI GLOBAL

NETHERLANDS

ABOUT NAZALI NETHERLANDS

As part of NAZALI, our Amsterdam office has become active in the Netherlands since October 2020.

With its professional team, NAZALI Netherlands (through its Amsterdam office) offers a comprehensive blend of services in the field of, amongst others: Tax, Legal, Accounting, Compliance, Corporate Governance, Customs and Immigration.

The Dutch team exists of professionals having the right knowledge and experience in their field of scope, knowing the Dutch legislation as well its applicability in the daily business activities. This assures the client always being compliant with the legislation, but secures the client also being pre-informed on developments in the Netherlands.

NAZALI Netherlands is committed to provide services through its professionals from different disciplines and in close collaboration with NAZALI professionals in other jurisdictions. As one devoted team, under one roof, to maximise the exploitation of opportunities and chances for its Clients. This sets NAZALI apart from all other service providers.

NAZALI Netherlands is headed by Mr. Talip Sığırcıkoğlu as Partner and Managing Director. He gained broad experience in legal and finance services, but also has strong developed skills in the field of coordinating processes, management, coaching as well in business development. Talip Sığırcıkoğlu is specialized in guiding foreign companies who want to establish in the Netherlands and safeguards their legal goodstanding.

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CURRENT NEWS ABOUT NETHERLANDS

» Amsterdam welcomes BRAND NEW GALAXY

The global marketing and technology company called Amsterdam "the new commercial hub of Europe" and "remarkable and innovative city" as it launched in the Dutch capital. Brand New Galaxy joins a number of leading creative companies that have made Amsterdam their home, including Design Bridge, 180 Kingsday and D8.

» Asensus Surgical Announces New Training Center in Amsterdam

This training center will serve surgeons and staff throughout Europe with basic and advanced training on Asensus' Senhance® Surgical System, the world's first digital platform for laparoscopic surgery.

» The Netherlands' most powerful supercomputer being built in Amsterdam

The Netherlands' most powerful computer is being built in Amsterdam to help power advanced scientific research. The Lenovo Data Center Group (DCG) is creating the new supercomputer for SURF, a Dutch tech cooperative of universities, schools, research institutes and university medical centres.

» Committee set up to investigate conduit companies

The Dutch cabinet set up a committee to investigate how many conduit companies pay taxes in the Netherlands to see their real contribution to the Dutch economy.

» Minimum wage amounts

The minimum wage amounts in the Netherlands changed per 1 January 2021.

» New agreement between the Dutch innovative aviation industry and Airbus

The aim is to properly position Dutch tech companies and our manufacturing industry and to remain innovation leader.

» World Economic Forum

From the 37 countries which have been surveyed in relation to the Global Competitiveness, the Netherlands is the fourth strong economy in the world to recover successfully from the corona crisis.

» Dutch cabinet: more money for fixed costs for entrepreneurs

In the first and second quarter of 2021, entrepreneurs will receive a higher maximum allowance for fixed costs (TVL). In the first quarter, the cabinet will also increase the maximum stock subsidy for closed retail trade from 200,000 euros to 300,000 euros. The cabinet is earmarking 375 million euros for this expansion.

» Getting prepared for Phase 2 of Brexit.

As of April 1, 2021, phase 2 of the Border Operating Model will begin. Goods subject to sanitary and phytosanitary controls will have to meet additional requirements when imported into the UK.

ANNUAL ACCOUNTS AND AUDIT REQUIREMENTS IN THE NETHERLANDS

Ms. Yuni Irawati Swart
Accounting Officer

ABSTRACT

When it comes to the period of year end, most of companies will come to the end of the fiscal year and prepare the financial results for the year in their annual financial report. Over the years, and due to European Directives, the regulation and legislation with respect to the annual accounts in the Netherlands have increased significantly, in this regard the Netherlands offers a highly regulated environment for corporations, partnerships and privately owned businesses. The legal requirements relating to the annual accounts are included in Title 9 Book 2 of the Dutch Civil Code (DCC).

Key Words: Financial Statements in the Dutch Law, Publication of the Annual Accounts, Audit, Corona Pandemic, Dutch Emergency Act.

INTRODUCTION

The annual accounts or the financial statements are part of the three foundation of the Dutch corporate regime. The other two essential foundation of the regime are the audit and the publication of the accounts itself.

The obligation to prepare financial statements practically applies to every Dutch corporation, and this obligation is usually stated in the statutes of the corporate entity. Some derogation applies to certain type of legal entity. The company can follow the format and the layouts of the financial statements as required by the law, these are extensively explained and provided in Title 9 Book 2 of DCC.

Further details on the annual accounts, the audit to the annual accounts as required by Dutch law, the publication of the accounts and the current development due to Corona pandemic will be explained below.

THE FINANCIAL STATEMENTS AND THE DUTCH LEGAL SYSTEM

The financial statements are an essential building stone for the Dutch legal system and form the basis for corporate governance.

Title 9, Book 2 of the Dutch Civil Code provides rules on the drawing up and publication of annual accounts. These provisions are the result of the implementation of the Fourth and Seventh Company Law Directives of the European Communities Council into Dutch company law[1].

The following are the two Directives with their own specific subject:

- Directive 78/660/EEC of 25 July 1978, OJ 1978 L 222. This Directive is based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies.

- Directive 83/349/EEC of 13 June 1983, OJ 1983 L 193. This Directive is based on Article 54 (3) (g) of the Treaty on consolidated accounts.

The financial statements offer transparency into the company business activities and mainly serve as a report to the shareholders and to protect the creditors. It generally consists of a balance sheet, a profit and loss account and notes to the accounts. The layouts of each item of the accounts are proposed in the Directive to be chosen. The implementation of this provision in the Netherlands can be found in Article 2:361 DCC.

1 *DCC, Book 2 Legal Persons, Title 2.9 Annual accounts and annual report.*

In addition, the company is obliged to publish its annual report after the determination or approval of the financial statements by the shareholders within 8 days. This means filing a copy of the financial statements with the Dutch Chamber of Commerce, this lays in Article 2:394 DCC.

The following is the highlights of the Article 2:394 on the publication of the annual accounts in the Dutch Chamber of Commerce.

1. The legal person is obliged to publish the annual accounts within eight days after adoption. Publication is made by depositing a full copy of the annual accounts, drawn up in the Dutch language or in other languages, French, German or English are allowed. The annual accounts are deposited or filed at the office of the commercial register kept by the Chamber of Commerce. The date of adoption and approval are noted on the copy.

2. When the annual accounts have not been adopted in agreement with the legal requirements within two months after the required period for their preparation has ended, the draft of the annual accounts (unadopted) shall be filed and shall mention that the accounts have not yet been adopted.

3. No later than thirteen months after the end of the financial year, the legal person must have published the annual accounts in the legally required way.

AUDIT REQUIREMENTS IN THE NETHERLANDS

The audited annual accounts are required by law in the Netherlands, this applies only for medium and large companies. Addition to that it also applies to companies that apply IFRS. They fall in this category and have obligation to have their accounts audited. An exemption may be granted for a Dutch company to have the audit performed at Dutch level, when it can apply for a Group Exemption in accordance with article 2:403 and article 2:408 DCC [2] [3].

In article 2:403 mainly explains the conditions of a company to be exempted or as a part of Group Exemption (after liability has been accepted for group subsidiaries). The conditions such as the members or shareholders have stated in writing, after the start of the financial year and prior to the adoption of the annual accounts, to agree with an exemption from these requirements; the financial data of the company are consolidated by another company into its consolidated annual accounts.

While article 2:408 focuses on part of groups which not required to do consolidation. The exemption applies for this part of groups with conditions such as the financial data that a company should consolidate are included in the consolidated annual accounts of a larger entity in the group; the consolidated annual accounts and annual report are drawn up in accordance with the provisions of the Seventh Council Directive (83/349/EEC) on annual and consolidated accounts or, if those rules need not be followed, in a similar way.

For medium and large companies as mentioned earlier, the law requires that companies in these categories must create an annual financial report audited by an independent, a qualified and a registered auditor, from a Dutch accounting firm. This auditor also needs to be appointed by the general meeting of shareholders of the company, or the managing or supervisory board (Article 2:393 DCC).

Micro and small companies, they are not required to be audited. A branch of a parent company is generally exempted from an audit. If the audit is not obligatory, they may have the option for a voluntary audit.

The size classifications are based on 3 (three) criteria, the value of the assets, the net revenue and the number of employees (Article 2:396 and Article 2:397 DCC). The parameters for these classifications are summarized in the table below. In order to qualify for the medium or large categories, at least two of the three criteria must be met in two successive years.

Criterion	Micro	Small	Medium	Large
Assets	< € 350,000	€ 350,000 - € 6mio	€ 6mio - € 20mio	> € 20mio
Turnover	< € 700,000	€ 700,000 - € 12mio	€ 12mio - € 40mio	> € 40mio
Employees	< 10	10 - 50	50 - 250	> 250

2 *DCC, Book 2 Legal Persons, Section 2.9.12 Provisions regarding legal persons of distinguished types.*
3 *DCC, Book 2 Legal Persons Section 2.9.13 Consolidated annual accounts.*

CORONA PANDEMIC AND THE YEAR-END FINANCIAL PROCESS

The corona pandemic (COVID-19) can have an impact on the quality of financial processes and for the timely completion of the financial statements. For auditors, remote monitoring and interim adjustments in the risk analysis will lead to additional work. This is mentioned in the handout issued by the NBA (Koninklijke Nederlandse Beroepsorganisatie van Accountants or Royal Dutch Association of Accountants)[4].

The concerned aspects include the Continuity (assurance and risks valuation), the Processes (remote work leads to increase risk/fraud), the Accounting work (change of approach/no physical encounter), and the Timeliness (care is more important than speed). The Stakeholders should be proactively informed of the potential risks of delays in processes which lead in delaying the delivery of the audited financial statements. The advance planning and good coordination should be set among all parties involved, in order reduce this risk[5].

Because of this pandemic outbreak, the Dutch Emergency Act was issued on 24 April 2020 by the Dutch Authority. This Emergency Act facilitates for temporarily rules deviating from the current requirements of Book 2 of the DCC for Dutch legal entities on the subjects among others as follows:[6]

1. The form of decision-making and general meeting.

2. Extension of the period to prepare the annual accounts.

3. Limitation on the 'presumptions of proof' for directors' liability for the late filing of the annual accounts, in the event of bankruptcy.

This Emergency act was initially expired in September 2020, it is now extended to 1 April 2021. The temporarily rules under the Emergency Act apply retroactively from 16 March 2020.

4 *NBA handout 1147, dated 22 December 2020.*
5 *NBA handout 1147, dated 22 December 2020.*
6 *Dutch Authority, Regeling - Tijdelijke wet COVID-19 Justitie en Veiligheid - BWBR0043413*

CONCLUSIONS

In the Netherlands, companies generally need to produce and also publish their annual accounts. In some cases, in view of their size, the annual accounts should be consolidated and audited. COVID-19 brings its own challenges, but the law remains in place. Some derogations have been issued to ease temporarily rules and regulations due to COVID-19 measurements.

EASIER TO SET UP PRIVATE LIMITED LIABILITY COMPANY IN THE NETHERLANDS

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Legal Consultant and Director Holland Desk

ABSTRACT

In the Netherlands the Flex BV Act entered into force on 1 October 2012. This new Act was necessary to ensure that the rules for private limited liability companies (Besloten Vennootschappen) became simpler, more flexible and in line with the wishes that existed in practice. Many rules were perceived as rigid and unnecessarily burdensome. The new regulation provided shareholders the opportunity to regulate their mutual relationships and create more room to adapt the structure of the company. The new BV form should also ensure a more competitiveness on an international level and become more attractive as a country of residence for national and international companies. Finally, the Flex BV Act offered the opportunity to resolve various bottlenecks and ambiguities in the old private limited liability Act.

Key Words: Flex-BV, Capital Contribution, Deposit Obligation, Distribution and Balance Sheet Test, Statutory Obligations, Dispute Settlement.

INTRODUCTION

The Flex BV stems from two Acts: The Simplification and Flexibility of BV Act (hereinafter: "Flex BV Act") and the Implementation Act the Simplification and Flexibility of BV (hereinafter: "Flex BV Implementation Act") and entered into force on 1 October 2012.

The Flex BV Act had to put an end to the rigid and unnecessary legal rules. The old BV Act created unnecessarily high costs for the entrepreneurs. The requirements of the practice were met by introducing more flexible rules. An attempt was made to resolve the bottlenecks and ambiguities in the old BV Act by means of the new regulation. The new regulation had to offer entrepreneurs more room to organize their businesses form. The new legal form had to become more competitive and the Netherlands should serve as a country of residence for national and international companies.

The changes introduced by the Flex BV Act and why the choice of a Flex BV has become more attractive and simpler for both national and international entrepreneurs will be discussed below for each section.

I. NO MINIMUM CAPITAL REQUIREMENT

The capital protection rules for the BV have been radically revised in the new regulation. A minimum capital requirement of 18,000 euros for the establishment of a private limited company is no longer valid. The abolition of the minimum capital means that a BV can be set up with a very small capital, for example one share with a nominal value of 0.01 eurocent[1].

II. NO OBLIGATION TO INCLUDE SHARE CAPITAL IN ARTICLES OF ASSOCIATION

A company can choose to include or exclude a share capital shares in the articles of association state the number of shares[2]. If a company chooses in its articles of association to include a share capital, article 2:231a of the Dutch Civil Code applies. If no capital share is included in the articles of association, shares may be issued without restriction.

III. NO MINIMUM DEPOSIT REQUIREMENT

In the new regulation it is possible to agree that the entire payment obligation will not be paid when the share is taken, but will be fulfilled at a later time. Therefore, there are no liability regarding the issued capital at the time of incorporation or the joint and several liability of the directors regarding to the failure to comply with the minimum payment obligation on time[3].

IV. NO BANK STATEMENT OR AUDITOR'S REPORT REQUIREMENT

The new regulation makes it possible to pay shares in cash without bank statement or to pay shares other than in cash without the auditor's report requirement[4]. In the case of contribution in kind, a description of what is contributed, signed by the founder (s), is still required. Only the reference date for the description and the valuation has been changed from a maximum of five months to a maximum of six months before the contribution. The description must be available for inspection by (future) shareholders and persons entitled to attend meetings[5].

V. INTRODUCTION OF DISTRIBUTION TEST AND LIMITED BALANCE SHEET TEST

The protection of creditors is centered around the distribution test in all forms of distribution to shareholders and the associated liability regime for directors and shareholders. The extensive balance sheet test used to apply. The new regulation adopted the limited balance sheet test and distribution test. The profit made does not automatically accrue to the shareholders. The general meeting of shareholders is authorized to resolve on the appropriation of profit and to determine distributions, insofar as equity exceeds reserves which must be held by law or the articles of association.

Balance sheet test means that distributions from profit or reserves are only permitted to the extent that shareholders' equity exceeds the reserves that must be maintained by law or by the articles of association[6]. This test does not apply if the BV has no legal or statutory reserves. The Articles of Association may provide otherwise.

The distribution test means that the board must assess whether the BV will still be able to continue to pay its due and payable debts after the distribution has been made[7]. It is not permitted to have a distribution take place if the BV cannot continue to pay its due and payable debts after the distribution. The distribution test applies for all situations in which the company has capital distributes: upon distribution of profit or reserves, upon repayment on shares in the context of a capital reduction and upon purchase of own shares otherwise then free of charge.

In the event that an irresponsible distribution takes place with the consent of the directors, the directors are personally bound to the company for the deficit that has arisen as a result of the distribution, unless the director proves that he is not to blame. Directors are jointly and severally bound to the company for the amount of the distributions if they make distributions, while they knew or should reasonably have foreseen that the company would no longer be able to continue to pay its due and payable debts after the distributions.

The person who received the payment while he knew or should reasonably have foreseen that the company would not be able to continue to pay its due and payable debts after the distribution is obliged to pay compensation with the legal interest from the day of the payment[8]. Distribution decisions taken in violation of the balance sheet test are void[9].

VI. FINANCIAL SUPPORT BY THIRD PARTIES

In the old regulation it was forbidden to provide a BV with financial support to prospective

1 *Parliamentary documents II 2006/07, 31 058, no.3 (explanatory memorandum), p. 26.*
2 *Ibid, p.39.*
3 *Ibid, p. 40.*
4 *Ibid, p. 27.*
5 *Parliamentary documents II 2006/07, 31 058, no.3 (explanatory memorandum), p.61-62.*
6 *See article 2:216 paragraph 1 of the Dutch Civil Code (hereinafter 'DCC').*
7 *See article 2:216 paragraph 2 and 3 DCC.*
8 *See article 2:216 paragraph 3 DCC.*
9 *Article 2:14 paragraph 1 DCC.*

shareholders with a view to taking shares. In other words, the company provided security to finance its own takeover[10]. The legislation for financial support to third parties has lapsed [11]. By removing this prohibition, BV can now in principle financially support the acquisition of shares by third parties in its capital, provide a price guarantee or otherwise provide security.

VII. NO MANDATORY TRANSFER RESTRICTIONS

In the old regulation, the free transferability of shares was limited to a group of persons referred to by law. For any other transfer, the articles of association had to contain a blocking regulation. The mandatory blocking regulation has lapsed[12]. Companies can opt for the offering regulation applicable under the law, for a statutory limitation or exclusion of the transferability of shares or have the option of stipulating in the articles of association that no restrictions at all apply to the transferability of shares. Companies that opt for a statutory blocking regulation are given more scope to design that regulation as they see fit. In the latter case, the shares are freely transferable.

VIII. ISSUE OF NON-VOTING AND NON-PROFIT SHARES

Due to the changes in the new regulation BV can also issue non-voting shares[13] or issue shares with no or only a limited right to share in the profit or reserves of the company. Such rules may particularly benefit joint ventures and family businesses. The holders of non-voting shares have meeting rights, profit rights[14], to request inquiry under certain conditions[15] and to claim for annulment of a decision[16]. If shareholders with voting rights wish to take a decision outside of a meeting, they need the consent of all those entitled to attend meetings, including those of holders of non-voting shares. The advantages of non-voting shares occur in the first place in situations in which the BV wishes to grant financial advantage without giving the opportunity to control the BV by means of voting rights or in case the BV wishes to allow employees to participate by means of shares without having voting rights.

The holders of shares of a specific type or designation with no or only a limited right to share in the profit or reserves of the company[17] have only the voting right. The advantage of non-profit shares is when for example the father wants to hand over the family business to his children. However, the father no longer wants to be entitled to the profit of the company. By giving the father no-profit shares, he still influences the company through voting rights.

IX. REGULATION FOR THE PURCHASE OF OWN SHARES EASED

The regulation that the repurchase of own shares up to a maximum of 50% of the issued capital was permitted has been deleted. In addition, the previous legal conditions that the articles of association permit the acquisition and that an authorization for acquisition has been granted by the general meeting or another body designated for that purpose has lapsed. Instead of the system of authorization by the general meeting, it has been determined that the board decides on the acquisition of shares in the capital of the company[18]. All shares, except for one share with voting rights, may be repurchased. This share must be held by someone other than the BV itself or one of its subsidiaries[19]. In order to protect the company's creditors only the acquisition of fully paid-up shares is permitted and the BV may not repurchase its own shares if the shareholders' equity, less the acquisition price, is less than the reserves that must be maintained by law or the articles of association. The board decides on the basis of a liquidity and a balance sheet test. If the management board knows or should reasonably foresee that the company will not be able to continue to pay its due and payable debts after the repurchase of own shares, then the board members are jointly or severally liable to the company to compensate the deficit incurred by the repurchase of own shares has arisen. For the decision of the management board there is no longer authorization from the general meeting of shareholders required. It is possible to exclude or limit the acquisition by the company of its own shares in the articles of association[20].

If, after an acquisition, the company cannot continue to pay its due and payable debts other than for no consideration, the directors who knew this at the time of the acquisition or should reasonably have foreseen this, are jointly and severally liable to the company to compensate the deficit incurred by the acquisition has arisen, with the statutory interest from the day of the acquisition.

X. CONTRIBUTION OF CAPITAL IN OTHER CURRENCIES POSSIBLE

It has been made possible to denominate the amount of the authorized capital, the issued capital and the paid-up part thereof, as well as the nominal amount of the shares in a foreign currency[21]. The possibility is limited to one foreign currency. It is not allowed to use two different currencies.

XI. ANNUAL SHAREHOLDERS MEETING

In the Flex BV Act changes have been made and the rules are simplified regarding the Annual shareholders meeting. Now it is possible to hold at least one general meeting or at least once outside a meeting during each financial year[22]. The Shareholders' meeting can be held abroad when this is stated in the articles of association[23]. The annual accounts can be adopted in a general meeting but also by written resolution. Adoption of the annual accounts does not automatically constitute a discharge; a separate provision in the same resolution is required to discharge the management board.

In the case of the shareholder-managed BV, the signing of the annual accounts by all management board members and supervisory directors is considered to be the adoption of the annual accounts and the signature also as discharge if all other persons entitled to attend the meeting have been given the opportunity to inspect the annual accounts drawn up and have agreed to this manner of adoption.

It is easier to request in writing a general meeting as one or more holders of shares who alone or jointly represent at least one hundredth (1%) of the issued capital[24]. The convocation and voting can also be done by e-mail if the articles of association allow this[25].

XII. STATUTORY OBLIGATIONS

Articles of association can attach obligations to shareholders. It is possible that obligations of a contractual nature, towards the company or third parties or between shareholders, are attached to the shareholding, attach requirements to the shareholding, stipulate that in cases described in the articles of association, the shareholder is held to hold shares or part thereof to offer and transfer[26]. This will benefit partnerships such as joint ventures. Joint ventures can include all obligations and agreements in the articles of association instead of drawing up shareholders' agreements. This will not only save costs, but also offer joint ventures more freedom to set up and create their business structure.

The articles of association may provide that the management board must act in accordance with the instructions of another body of the company, unless these are contrary to

10 *See old article 2:207c of DCC.*
11 *Parliamentary documents II 2006/07, 31 058, no.3 (explanatory memorandum), p. 27.*
12 *Ibid, p. 49 and see also (old) article 2:195 DCC.*
13 *See article 2:228 paragraph 5 DCC.*
14 *See also article 2:227 paragraph 1 DCC and Parliamentary documents II 2006/07, 31 058, no. 3 (explanatory memorandum), p. 10-11.*
15 *See article 2:346 DCC.*
16 *See article 2:15 DCC.*
17 *See article 2:216 paragraph 7 DCC.*
18 *Parliamentary documents II 2006/07, 31 058, no.3 (explanatory memorandum), p. 64.*
19 *See article 2:175 paragaph 1 DCC.*
20 *Article 2:207 DCC.*
21 *Article 2:178 paragraph 2 DCC.*
22 *Article 2:218 DCC.*
23 *Article 2:226 paragraph 1 DCC.*
24 *Parliamentary documents II 2006/07, 31 058, no.3 (explanatory memorandum), p.76-77.*
25 *Article 2:223 paragraph 2 DCC.*
26 *Article 2:192 DCC.*

the interests of the company and its affiliated enterprise[27].

The articles of association may provide that directors are appointed by a meeting of holders of shares of a specific type or designation. Rules may be included in the articles of association that limit the circle of nominal persons by setting requirements that the directors must meet[28]. The legal quorum requirement that the votes must represent half of the issued capital has thus lapsed. The legal requirement that a binding nomination contains at least two persons for each place to be filled has also been removed. The new regulation stipulates that if the nomination contains one candidate for a place to be filled, a decision on the nomination will result in the nomination being appointed, unless the nomination is deprived of its binding character[29].

XIII. IMPROVEMENT OF LEGAL DISPUTE SETTLEMENT

BVs that want to avoid going to court can choose to include a dispute settlement in the articles of association or a shareholders' agreement, whereby an arbitrator is appointed or otherwise deviates from the legal jurisdiction[30]. The dispute settlement offers shareholders a right to exit, if the continuation of their shareholding can no longer reasonably be required[31]. In addition, protection can be found in the right of inquiry and in the rules for nullity and voidability of decisions[32]. If one wishes to deviate from the main statutory rules in important parts, the law imposes additional requirements on decision-making by prescribing unanimity or stipulating that a regulation cannot be imposed on him against the will of a shareholder.

CONCLUSION

The Dutch legislator has made the legal form BV more attractive and simpler by means of the Flex BV Act. On the one hand, the changes have provided simpler rules such as the abolition of the minimum capital requirement, no accountancy and bank statement, no blocking regulation, allowing financial aid by third parties, making the purchase of own shares easier and on the other hand, there is more space to shape the structure of the company by offering the possibility to make a provision in the articles of association regarding the issue of non-voting rights shares and/or non-profit rights shares, the transfer of shares, statutory obligations and dispute settlement.

In addition, creditors are better protected by the introduction of a limited balance sheet test and distribution test and by increasing the responsibility of directors and shareholders in particular. Finally, it can be stated that the Netherlands is seen as an attractive country for foreign entrepreneurs. After all, many foreign entrepreneurs have set up the company in the Netherlands. This also seems to have achieved the legislator's aim to attract more foreign entrepreneurs with the introduction of Flex BV. Because the rules have also been simplified for Joint Venture BV, there has been an increase in the number of joint ventures established or to be set up by foreign entrepreneurs in the Netherlands.

27 Article 2:239 DCC.
28 *See article 2:242 DCC and see also Parliamentary documents II 2006/07, 31 058, no. 3 (explanatory memorandum), p. 92.*
29 *Article 2:243 paragraph 3 DCC.*
30 *Article 2:337 paragraph 2 DCC.*
31 *Parliamentary documents II 2006/07, 31 058, no.3 (explanatory memorandum), p. 4. And see also article 2:336 paragraph 1 DCC.*
32 *See articles 2:345 and 2:356 DCC.*

NAZALI GLOBAL MAGAZINE

THE INTERPRETATION OF ´CONTROL GROUP´ FOR HYBRID MISMATCHES AND THE WHTA

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ABSTRACT

In the Netherlands, the Dutch Withholding Tax Act has been introduced since 1 January 2021. Before implementation there has been critique on this Tax act because of the unproportional taxation that can occur in certain situations. Together with the legal uncertainty that is bound to the concept of the control group this brings new challenges and bottlenecks to the Dutch Withholding Tax Act along the current legislation of Hybrid Mismatches in the Dutch Corporate Income Tax Act as a result of the implementation of ATAD2. This issue is especially important for private equity investors who invest in companies together.

Key Words: Hybrid Mismatch, Withholding Tax Act, Bottleneck, Control Group, Private Equity, Double Taxation,

INTRODUCTION

With the implementation of the Dutch Withholding Tax Act ("WHTA") on 1 January 2021 and the regulation on hybrid mismatches in regard to ATAD2 in the Dutch corporate income tax act ("CITA"), there is legal uncertainty on the concept of the 'control group' ("CG"). The concept of CG is i.a. important for private equity investors who invest together through a partnership, and possibly also for Turkish investors who for example would like to invest via the Netherlands through a legal person like a BV or by immigrating to The Netherlands themselves and investing as an individual.

For Dutch tax purposes, partnerships (CV-like entities) are seen as non-transparent from a unique Dutch tax perspective while in other member states they are seen as transparent. This means that the same entity that is not seen as a legal person in another country, is seen as such in the Netherlands, as a result of which the taxation falls on that legal person instead of on the underlying shareholders. In the other country the tax would be levied on the underlying shareholders.

This difference in qualification is the base for the risk of a hybrid mismatch with respect to the concept of CG. However, this concept is also important for the WHTA to determine whether there is a taxable person. In this paper I will explain by means of an example when there may be a CG for the WHTA and the CITA.

Section 1 sets out the WHTA, Section 2 sets out the hybrid mismatch, Section 3 sets out the qualification of a CG. Section 4 sets out the bottleneck that arises between the hybrid mismatch and the WHTA due to the concept of CG.

I. DUTCH WITHHOLDING TAX ACT

From 1 January 2021 the WHTA has been implemented; WHT will be levied on intra-group interest payments and royalties paid or accrued by a Dutch corporate taxpayer (an entity or a permanent establishment ("PE")) to a related entity that is a resident in:

- A jurisdiction with a statutory tax rate lower than 10%
- A jurisdiction that is included on the European Union ("EU") list of non-cooperative jurisdictions
- Other jurisdictions if the entity allocates the interest or royalties to a PE in a jurisdiction with a statutory tax rate lower than 10% or a jurisdiction that is included on the EU list of non-cooperative jurisdictions.
- Certain abusive situations, which includes (deemed) payments/accruals to hybrid entities.

The withholding tax rate is equal to the highest rate of CIT. In 2021 it will be 25%. The WHT is levied on the Dutch corporate taxpayer.

II. HYBRID MISMATCHES (ATAD2)

ATAD2 aims to counter hybrid mismatches. Hybrid mismatches are situations in which a tax benefit is obtained between related entities in EU member states and between EU Member States and third countries. These benefits are obtained due to qualification differences of entities.

These differences occur in situations in which a tax benefit is obtained by making use of differences between different tax systems with regards to the fiscal treatment of entities, instruments or permanent establishments. The differences between these corporate tax systems can result in the following:

1. A payment (in one country) is deductible, but the corresponding revenue (in the other country) is not taxed (deduction – no inclusion), or

2. One and the same payment (cost or loss) is deductible multiple times (double deduction).

In the first case the mismatch is neutralized by applying the 'primary rule'[1]; no deduction of a payment of interest at the level of the sending entity that at the receiving entity is not included in the tax base (deduction, no inclusion), this is the case if the sending party is located in the EU. When the sending party is not located in the EU, the secondary rule[2] is applicable in which the payment in most cases will be included in the tax base of the receiver.

If there is a situation under ii. the tax benefit that can be obtained with double deduction is removed by refusing the deduction once. This primary rule allows deduction in the country that is considered to be the country of the payer. However, if the other country also allows the deduction, a secondary rule stipulates that the country of the payer still refuses the deduction of the payment.

III. QUALIFICATION OF PARTNERSHIPS; CONTROL GROUP

For the definition of a CG (and therefore a related entity) article 12ac paragraph 2 CITA refers to article 10a paragraph 6 CITA in which the CG is mentioned but not defined, in addition the CG must hold 1/3 of the shares in the entity to be an associated enterprise. Please note than on an EU level according to article 2 of ATAD2 this share must be 25%. Notice that the interpretation of Dutch CITA is less stringent then on EU level. This leaves room for a lot of interpretation and can cause legal uncertainty.

The Dutch legislator is aware of the legal uncertainty that the lack of a definition brings, also in regard to the uncertainty it will bring to the WHTA. But the legislator has chosen for a case-by-case approach[3]. According to the legislator whether there is CG is depended on the case-by-case facts and circumstances and in the opinion of the Dutch government it is preferable not to define the concept of CG. To depend on whether there is a CG I have chosen to take the approach as stated by the authors in the WFR article 2020/237[4] . According to the criteria as set out in the article a CG is considered to be present if the following 2 elements are present:

1. A coordinating (legal) person has the material control over the forming of the investment; and

2. Each shareholder provides equity and (risky) loans on more or less similar terms and conditions.

These main elements originate from ATAD1 in article 2 for the definition of an associated

1 *Article 12aa CITA*
2 *Article 12ab CITA*
3 *Kamerstukken II 2016/17, 34552, nr. 3, p. 30.*
4 *van der Have BSc, J. C., & van Hulten MSc, L. C. (2020). De samenwerkende groep in de context van hybride mismatches. WFR, 2020(237), 1613–1619.*

enterprise in which is stated that an associated enterprise is 'a person who acts together with another person in respect of the voting rights or capital ownership (....)'.

The lack of the definition of a CG stems from the fact that the concept of associated enterprise (ATAD2) did not include an explanation of when it refers to acting together. When looking for a definition of acting together looking at it from an international perspective on BEPS level, is the best approach.

In the 2015 report of BEPS[5], the OECD states that acting together is when two (legal) persons will be treated as acting together in respect of ownership or control of any voting rights or equity interest if;

a. They are member of the same family

b. One person regularly acts in accordance with the wishes of the other person

c. They have entered into an arrangement that has material impact on the value or control of any such rights or interest; or

d. The ownership or control of any such rights or interest are managed by the same persons or group of persons

Another underlying basis for these 2 main elements is the term Effective control; One person has a sufficient interest in another person and as a result has de facto control over decisions. When there is enough effective control depends on the facts and circumstances and should be assessed in a case-by-case approach[6]. There can also be effective control when one entity has 20% of the shares and all the others only have small shares[7].

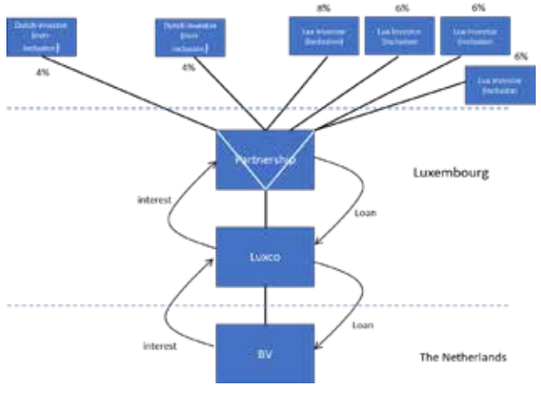
The above stated can give a sufficient guideline on when it is possible to qualify a group of investors as a CG for CITA purposes.

BOTTLENECK HYBRIDE MISMATCH AND WHTA

In both Dutch tax codes the problem that causes taxation is the definition of a CG. This problem arises due to the look-through approach[8] that is implemented in both tax codes in which for the Dutch fiscal analyses, you have to look at what the tax implications would be if an entity would have been established in The Netherlands. This causes bottlenecks between the two tax codes. These bottlenecks are caused by the unique Dutch fiscal qualification of some CV-like entities, qualifying it as non-transparent, whereas other countries tend to qualify a CV-like entity as transparent.

The definition of a CG is defined in article 12ac paragraph 2 CITA and article 1.2 WHTA. In the following I will discuss a structure in which I will argue why there is a CG. In the following the BV can deduct interest from its tax base without the Dutch investor at the top of the structure including the income in its tax base due to the hybrid character of the partnership, when the partnership can be qualified as a CG the BV would not be able to deduct the interest in the CITA that is attributed to the Dutch investors. The example below explains this further.

Example



5 *Neutralizing the effects of hybrid mismatches arrangements OECD 2015*
6 *van der Have BSc1, J. C., & van Hulten, L. C. (2020). De samenwerkende groep in de context van hybride mismatches. Weekblad Fiscaal Recht, 2020(237), paragraph 2.2*
7 *Example 11.3 uit OESD (2015), Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 — 2015 Final Report, p. 449-450.*
8 *Treating Luxco as if it is a Dutch BV according to article 12 ad CITA; imported mismatch*

In the above example the partnership receives a loan from Lux and Dutch investors. The partnership is located in Luxemburg alongside the Luxco. The partnership grants the same loan to Luxco and Luxco grants the loan to BV in The Netherlands. Subsequently BV pays interest on the loan to Luxco, Luxco pays the same interest further to the partnership.

HYBRID MISMATCH

The partnership is a hybrid entity, For Dutch purposes it is treated as a non-transparent entity, meaning that the interest income is included as income on the partnership level. For Luxemburg purposes the partnership is treated as a transparent entity, meaning that the interest is included on the level of the Lux investors and the Dutch investors.

Luxco to Cg

With this difference in qualification you can see that there is an inclusion in the tax base of the Lux investors. But due to the hybrid character of the partnership, the interest income is not included in the tax base of the Dutch investors but in the tax base of the partnership for Dutch tax reasons. This results in that there is possible deduction – non – inclusion for the interest that can be attributed to the Dutch investors according to article 12aa paragraph 1 under b CITA. But to qualify this transaction as a hybrid mismatch according to Dutch CITA, the Dutch investors and Luxco have to be qualified as related entities according to the definition of related entities for CG´s as stated in article 12ac paragraph 2 CITA. As stated in section 3, there are some conditions that must be met in order for there to be a CG according to the Dutch legislature;

- A coordinating (legal) person (one of the investors) has the material (effective) control over the - forming of the investment; and

- Each shareholder provides equity and (risky) loans on more or less similar terms and conditions (acting together).

If both of the above conditions are met it would be "more likely than not" that in the example the partnership will be qualified as a CG for Dutch CITA purposes and thus resulting in that the partnership and Luxco are associated enterprises. That will result in that the interest that BV pays to Luxco - at least for the part that belongs to the Dutch investors - will not be deductible as a result of it being a hybrid mismatch. This is the rectification that ensues when qualified as a hybrid mismatch. And that the interest that is in the tax base of the partnership will be included in the tax base of the Dutch investors. This is also a very interesting point for Turkish investors that have a presence in The Netherlands via a BV or are living in The Netherlands and invest as an individual. In that case it is in the best interest that the hybrid character of the partnership as stipulated in the example remains without the partnership becoming an associated enterprise for Dutch tax reasons and therefore becoming a hybrid mismatch. This ensures that the interest income stays in the tax base of the partnership and not to the underlying `Dutch investors`.

A potential example in which the investors are deemed to 'act together' is if one of the Dutch investors makes the decision on what the rest of the group will invest in, thus giving the Dutch investor the control over the shares of the rest of the investors. If it shows in practice that this is the case, it would be more likely than not that the investors could be qualified as a control CG and therefore form an associated enterprise to Luxco.

WHTA

At first glance it wouldn´t seem that the WHTA would be applicable in the example and that BV would not have WHTA levied on the interest it pays to Luxco. Luxembourg is not a country that is blacklisted by The Netherlands. But because of article 2.1 paragraph 1 sub c WHTA Luxco could be a taxable person if Luxco does not have substance according to Dutch guidelines, a lack of substance indicates an artificial constructure. Substance is in this case part of the objective test. With this the Subjective test also has to be tested; what are the tax implications if the partnership directly lends the loan to BV instead of Luxco first?

As described above, the partnership is a hybrid entity: non-transparent according to Dutch tax standards, transparent according

to Luxembourg tax standards. In this case, the partnership is in principle fully taxable on the basis of Art. 2.1 paragraph 1 part e of the WHTA, unless the conditions of the look-through approach of Art. 2.1 paragraph 4 of the WHTA are met. This requires that each investor in the partnership:

1. Holds a qualifying interest,

2. Does not qualify as a taxpayer for the WHTA and

3. Qualifies as a beneficiary of the interest in their country of residence.

The significance of a control CG is of importance for the condition of "Holds a qualifying interest". The same criteria that is of importance for hybrid mismatch in regards to the CG is also of importance for the WHTA (bottleneck). The partnership can be considered a CG under the circumstances beforementioned in Section 3. If the partnership is considered to be a CG it would mean it has a qualified interest in Luxco and ergo is an associated enterprise in accordance with article 1.2 paragraph 1 sub c under 5 WHTA.

The third condition of art. 2.1 paragraph 4 WHTA is where the discussion would occur with the Tax authority, because the Dutch investors are in this case not the beneficiary of the interest. This is a result of the non-transparency of the partnership for Dutch tax purposes and that the Dutch investors don't take the interest income into account for tax purposes. If in this case it could be argued that the investors could be qualified as a CG and they would hold a qualifying interest, it would be likely that the Tax Authority would state that the third condition should also be met.

CONCLUSION

If the partnership was deemed to be a CG for CITA and WHTA purposes then for the CITA the interest income that the partnership receives will be included in the tax base of the Dutch investors and the BV will be restricted to deduct the interest that can be attributed to the Dutch investors.

For WHTA purposes the BV would have Withholding tax levied on the interest paid to Luxco. This would result in a double taxation; namely in the CITA due to a hybrid mismatch and in the WHTA all due to the (lack of a) definition of a CG.

The above stipulates the importance of a clear definition or at least clear guidelines on when for Dutch tax reasons there is a CG present. This can make the difference between double taxation or no taxation at all in the CITA and the WHTA. Thus, when there is a CG will have to be apparent from the facts and circumstances, but for now the Dutch legislator prefers the case-by-case approach. For the future, concrete cases will have to show when there can be a CG for Dutch tax purposes and in what kind of cases. In conclusion The Netherlands is still very much an appealing place to settle as a (legal) person, but like always you have to be cautious of the rules and regulations in place.

RUSSIA

ABOUT NAZALI RUSSIA

NAZALI RUSSIA started its activities in December 2019.

In Moscow, NAZALI has signed up a promising team of players from prominent Russia-based law firms, top-ranked in most legal directories. Our associates have a wide-range expertise and knowledge of the local market, which is combined with all the advantages of the Head of Russia Partner thorough knowledge of the Turkish business major industries.

Our Russian team has credible experience and ample expertise to meet the legal and tax needs of companies doing business in Russia. NAZALI Moscow office is also providing comprehensive legal and tax support for international clients anticipating investments in Russia or expanding their presence, both inbound and outbound.

Now, NAZALI in Russia mostly focuses on high quality day-to-day legal and tax support required from small to large businesses of broad spectrum of industries. This includes ad-hoc advice, projects support, compliance issues, dispute resolution and litigation etc.

Our clients include a number of international and domestic businesses, including leading Turkish and international companies, and entrepreneurs.

As conditions continuously evolve, NAZALI always aims to further itself remaining true to its motto "GROW WITH KNOWLEDGE" and has set out with the aim of providing the most efficient and comprehensive solution for its clients. Hence, to meet these high standards our team is also constantly growing, both enhancing its expertise and welcoming new talents.

In response to the clients' needs NAZALI Moscow team has recently taken on board impressive professionals in the field of audit and accounting, thus, significantly enlarging the scope of assistance offered to clients.

NAZALI RUSSIA is headed by Ms. Altinay Sheralieva who launched the office in 2019. She worked as legal counsel of international investment projects, she is experienced in a wide range of issues, including, legal due diligence, merger and acquisitions, corporate law, contracts law. Ms. Altinay Sheralieva acts as Partner and General Director and has solid experience in assisting clients with regard to their projects in the Russian Federation and CIS jurisdictions.

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CURRENT NEWS ABOUT RUSSIA

» Automatic exchange of tax information launched between Russia and Turkey

The Federal Tax Service of Russia updated the list of jurisdictions participating in the automatic exchange of information on financial accounts for tax purposes by adding Turkey late in December 2020. The decision of Turkey to join into the automatic exchange of tax information with Russia will speed up in both countries the process of identifying mala fide taxpayers, including those who do not disclose information about their activities and do not report on their tax obligations.

» Tax benefits for IT-companies in Russia

From January 01, 2021, IT-companies shall have the right to apply a reduced profit tax rate of 3% instead of 20% and a reduced rate of insurance premiums of 7.6% instead of 14%. To be eligible to these benefits the IT-company shall receive a respective state accreditation, generate at least 90% of all income from the implementation of computer programs and related services and have at least seven employees.

VAT exemption will remain in force with respect to computer programs included in the unified register of Russian programs. VAT exemption applies not only to software developers, but also to other participants in the software supply chain.

» Amending tax exemption for long-term shareholding

Starting from January 01, 2021, Russian residents, including legal entities and individuals, can benefit from tax exemption with respect to capital gains arising from the sale of shares and participatory interest in Russian and foreign companies held for more than five years. Changing of the tax residency/re-domiciliation of such companies would not interrupt the shareholding period.

However, the said incentive will apply to capital gains from the sale of shares and participatory interest in foreign companies, provided that such companies are not located in jurisdictions black-listed by the Russian Ministry of Finance. Furthermore, tax exemption will not be available if the subsidiary qualifies as a "property-rich" company in Russia (i.e. the immovable property located in Russia represents more than 50% of the company's assets) subject to certain very limited exceptions (innovation companies listed on a stock exchange).

» Application of MLI in Russia

MLI starts its full-scope application as of January 01, 2021 between Russia and 27 jurisdictions. Its application will be limited to withholding taxes in relation to Cyprus, Czech Republic, Indonesia, Kazakhstan, Korea, Portugal and Saudi Arabia until 2022.

» Switch to digital document management system

Russian Federal Tax Service plans to build a new digital system that will result into 100% electronic document management in the b2b sector. Its implementation is scheduled to 2024. Since the tax service will receive online access to all transactions and primary documentation of the companies this could potentially result into introduction of new tax regimes providing for calculation of the taxes by the tax authorities rather than the taxpayers.

» Progressive scale of Personal Income Tax introduced in Russia

Starting from 2021, flat 13% rate of Personal Income Tax has been replaced with a progressive scale of tax. The cumulative amount of revenues exceeding the threshold of 5 million rubles will be assessed to 15% Personal Income Tax while the sums below the said threshold will remain taxable at 13%.

CONTRIBUTION TO PROPERTY AS AN INSTRUMENT OF FINANCING RUSSIAN SUBSIDIARIES

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ABSTRACT

Contribution to property, a specific instrument of financing Russian limited liability and joint-stock companies, allows to contribute to the assets of the companies without increasing the authorized capital, the nominal value of the shares and changing the allocation of shares among the shareholders.

With the introduction of the possibility of tax-free return of contribution to property to the contributing party as well as the right to deduct the contribution to property in the event of shares sale or liquidation of the company, this financing option shall gain in popularity with the investors.

Key Words: Contribution to Property, Limited Liability Company, Joint-Stock Company, Exemption From Profit Tax, Return of Contribution to Property.

INTRODUCTION

Contributions to property, alongside with loans and contributions to share capital, constitute one of the possible forms of financing Russia-based companies, subject to certain limitations described below.

The concept of the contribution to property is likely to be of Germanic origin[1].

The main feature that distinguishes a contribution to property from other financing options is that it does not increase the authorized capital and does not imply any consideration from the receiving company, whether in the form of a share in the company or an obligation to return the contribution after some time.

Initially the contributions to property were allowed in Russia with respect to the limited liability companies only. However, starting from 2016 the possibility to make contributions to property was offered to the shareholders of the joint-stock companies.

I. LEGAL ASPECT

Contribution to property requires the will of the person making such a contribution (the shareholder) and the will of the person receiving it (the company). The latter can take different forms: a decision made at the level of the general meeting of shareholders (with respect to mandatory contributions) and a decision made by the board of directors (with respect to voluntary contributions).

Contribution to property can be considered both as a right and an obligation of the company's shareholders. Whereby art. 27 of Federal Law dated 08.02.1998 No. 14-FZ "On limited liability companies" describes only the situation associated with the obligation of the shareholders to contribute, art. 32.2 of Federal Law dated 26.12.1995 No. 208-FZ "On joint-stock companies" emphasizes the shareholders' right to make contributions at any time.

With respect to the limited liability companies, the obligation of the shareholders to make contributions to property shall be stated in the company's charter. If the initial version of the charter does not contain such a provision, it can be amended through a resolution made unanimously by the general meeting of shareholders.

By default, the shareholders shall contribute money proportionally to their shares in the limited liability company's authorized capital.

However, the company's charter can impose different rules, including: (i) deviation from proportional order of contributions; (ii) possibility to contribute other property and property rights; (iii) upper limits of the contributions' value for all or designated shareholders.

Contributions to property are made pursuant to a resolution passed by the general meeting of shareholders with the 2/3 majority of votes (unless a larger number of votes is required by virtue of the company's charter).

In the joint-stock companies, the shareholders shall have the right to make contributions to property based on an agreement to be concluded between the shareholder(s) concerned and the company, subject to prior approval of such an agreement by the board of directors (supervisory board).

In non-public joint-stock companies (similar to the limited liability companies), the charter may provide for the upper limits of the contributions' value for all or designated shareholders and other restrictions concerning the contributions to property. The charter can also set an obligation for the shareholders to contribute to the company's property pursuant to a resolution of the general meeting of shareholders to be adopted unanimously and describe the procedure, grounds and conditions thereof. Should the obligation to make contributions to property be imposed on holders of a certain category of shares only, the resolution shall be passed by the 3/4 majority of votes provided that all the shareholders concerned unanimously express their consent.

As a general rule, contributions to property can be made in a form of money, things, shares in the authorized capital of other companies, state and municipal bonds, exclusive, other intellectual rights and rights under license agreements subject to monetary valuation, unless the above list is restricted by applicable laws or the company's charter[2].

Irrespective of the scenario chosen within a particular company, the contributions to property would never impact the amount of the company's authorized capital and its allocation between the shareholders (nominal value of their shares). Therefore, contributions to property do not somehow alter existing shareholding rights. Re-allocation of voting rights could be, however, agreed by the shareholders by way of entering into a shareholders agreement.

II. ACCOUNTING ASPECT

In accordance with the Russian accounting standards, contributions to property of the Russian companies shall be registered as "additional capital" (account 83). This position has been confirmed by the clarifications issued by the Russian Ministry of Finance[3]. From IFRS perspective, there is no specific guidance with respect to contributions to property. They should appear in the "equity" section (i.e. in the line "additional paid-in capital").

III. TAX ASPECT

As from 2018, contributions to property made in accordance with the procedures provided for by the Russian civil legislation (described above) shall be exempt from profit tax for the Russia-based recipient companies.

Indeed, according to art. 251 p.1 it. 3.7 of the Russian Tax Code, shall not be included in the profit tax base an income in the form of property (including money and other things), property rights or non-property rights in the amount of their monetary value, which are received as a contribution to property of a company in accordance with the civil legislation of Russia.

This profit tax exemption applies irrespective of the share held by the contributing shareholder (whether an entity or an individual) in the authorized capital of the recipient company. Resolutions of the general meeting of shareholders and agreements on contribution to property, as the case may be, shall be kept by the company as a documentary proof of compliance with the civil law requirements.

Before 2019 contributions to property were considered a form of non-returnable financ-

1 *Contribution to property not increasing the authorized capital: legal research. Laletina A.S., Kosyakin I.A.*

2 *Art. 66.1 p. 1 of the Civil Code*

3 *Accounting regulation "Income of the company" 9/99 approved by the Order of the Ministry of Finance dated 06.05.1999 No. 32n, Letter of the Ministry of Finance of Russia dated 29.01.2008 No. 07-05-06/18*

ing. Indeed, Russian civil legislation does not contain any provisions concerning the possibility to return the contribution to property to the shareholder that initially made it. At the same time, there is no express legal restriction in this respect. Considering that for tax purposes such transfer would have been assimilated to payment of dividends and assessed to profit tax accordingly, there was no particular practical interest in investigating this option.

However, the situation changed in 2019 when the Russian Tax Code was added with art. 251 p.1 it. 11.1 stating that the money received by an entity on a free of charge basis from a commercial company or partnership, in which such an entity is a shareholder, within the limits of the amount of this entity's previous contribution (contributions) to property made in the monetary form shall be exempt from profit tax. The entities (their successors) shall keep the documents confirming the amount of the corresponding contributions to property and the amount of funds received free of charge.

According to the comments of the Russian Ministry of Finance, the operation indicated in art. 251 p.1 it. 11.1 of the Russian Tax Code is the reverse of the operation of receiving money as a contribution to the property according to the Russian civil legislation, which is exempt from taxation by virtue of art. 251 p.1 it. 3.7 of the Russian Tax Code.

Nevertheless, it should be noted that the tax exemption with respect to money transferred on a free of charge basis back to the shareholder that previously made a contribution to property of a Russian company has a narrower scope of application as compared to tax treatment of an operation of receiving the contribution to property.

Indeed, new tax exemption applies to:

i. legal entities (whether Russia-based or foreign) having a share in the Russian company that initially acted as the recipient of contribution to property. The money returned to an individual having contributed to the company's property will be assessed to profit tax;

ii. Contribution(s) to property shall be made and returned in the form of money only. In case of contributions of another categories of property or property rights, reverse transfer of money will be beyond the scope of this provision. This should exclude mala fide actions associated with disproportionate initial investment and the method of its tax-free return.

Profit tax exemption applies to the free of charge transfers of money that take place after January 01, 2019. The date of initial contributions to property is not important for enjoying the tax benefit in question and can precede the said date. This opinion was supported by the Russian Ministry of Finance[4].

Even though the said provision is beneficial for promoting contributions to property as an instrument of investing into and financing the Russian subsidiaries, it creates some practical legal issues connected with the formalization and documentation of the operation of returning money to the shareholders.

Indeed, the legislators did not introduce respective amendments to the civil legislation that would expressly state the companies' right to return the contributions to property to their shareholders and the procedure to be followed (i.e. decision of the general meeting and/or agreement, required majority of votes etc.). In the absence of such provisions, the legal perimeter of this operation remains unclear, especially in a presence of a legal restriction on gifts exceeding 3 thousand rubles between legal entities[5]. For instance, the shareholders cannot claim the return of their contributions to property from the company. Thus, the return of contributions to property would be possible in case of mutual agreement of the shareholders only. Should the amount repaid to the corporate shareholder exceed the amount of his contribution(s) to property, the excess would be subject to withholding tax as dividends. The same treatment should be applicable to repayments in case of non-monetary initial contributions to property. However, until and unless the civil legislation is brought in line with new tax opportunities, we would recommend to avoid any cases of contribution to property returns other than specifically mentioned in the tax legislation.

Starting from January 01, 2021, further amendments regarding taxation of contributions to property came into force.

From now on, corporate taxpayers (whether Russia-based or foreign entities) selling shares in Russian companies are allowed to reduce their taxable base by the amounts of monetary contributions made to the company's property (art. 268 p.1 it. 2.1 and art. 280 p. 3 of the Russian Tax Code). The amount of the deductible contribution to the company's property is determined in proportion to the number of shares subject to sale in the total number of shares belonging to the shareholder.

Previously, only contributions to charter capital were deductible, including those made at a premium.

Similar provisions will apply in the case of property distribution when the Russian subsidiary is liquidated or when shareholders or participants exit the subsidiary (art. 277 p. 2 and art. 250 p. 1 of the Russian Tax Code).

New rules do not impose any limitation as to the date when contributions to property were made. These amendments will apply to both Russian and foreign shareholders.

CONCLUSION

Considering the foregoing, we can conclude that the changes in the tax legislation introduced the last years created necessary prerequisites for turning contributions to property into an alternative to interest-free loans and a versatile instrument of investing into and financing the activities of Russian subsidiaries.

This novelties should increase the investment attractiveness of the Russian companies since they will guarantee to the investor that all investments (not only contributions to authorized capital) will be taken into account in the event of exit from the business project.

4 *Letters of the Ministry of Finance dated 12.07.2019 No. 03-08-05/51772, dated 03.10.2019 No. 03-08-05/75878*
5 *Art. 575 p. 1 it. 4 of the Civil Code*

KEEP CALM AND INVEST IN RUSSIA

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ABSTRACT

Russia tries to improve its investment climate through such instruments as agreements on protection and promotion of investments, levying excessive regulatory barriers, facilitating currency control regulation. However, worldwide economic and epidemiologic situation, aggravated by the sanctions and specifics of carrying out business activities in Russia, does not contribute to attracting new investments to the country.

Key Words: Foreign Investments, Stabilization Clause, Compensation for Construction of Additional Infrastructure, Currency Control Liberalization, Business Climate Transformation, Tax Evasion.

INTRODUCTION

The time seems to be hard for the investors contemplating to explore and develop the Russian market. To increase the attractiveness of the investments new legal acts and instruments have recently been implemented.

I. AGREEMENTS ON THE PROTECTION AND PROMOTION OF INVESTMENTS: PERSPECTIVES AND AMBIGUITIES

The Law "On the protection and promotion of investments" (SZPKs) was adopted in April 2020. It provides for (i) stabilization clauses protecting against the increase of the tax burden and worsening of certain conditions of the investment project implementation and (ii) compensation of the infrastructure investments by the state.

The agreement (SZPK) is concluded between a private entity – Russia based company (with possible foreign shareholding) - and a public law entity – subject of the Russian Federation (region), on the territory of which the investment project is supposed to be implemented (with possible participation of the Russian Federation and / or a municipal entity).

SZPKs can be concluded both on the initiative of private entities (private project initiative, implemented through the application procedure) and on the initiative of public authorities (a public project initiative, implemented through the declarative tender procedure)[1].

New SZPK regime will not apply to the gambling business, the production of tobacco and alcoholic beverages, liquid fuels, oil and gas, wholesale and retail, construction (modernization, reconstruction) of administrative and business centers and shopping centers (complexes), as well as residential buildings[2].

Depending on the volume of capital investments, investors under SZPKs will be offered stabilization clauses that guarantee the non-application of acts (decisions) that worsen the conditions of the investment project implementation such as: (i) on changes in government support measures; (ii) on changing the procedure for granting rights to a land plot; (iii) on the establishment of additional obligations and reduction of the scope of the rights of land owners; (iv) on changing procedures related to urban planning activities, etc[3].

The investor of at least 10 billion rubles can also be offered a stabilization clause protecting against (i) an increase in the rates of export customs duties; (ii) increase in payments for negative impact on the environment, utilization and environmental fees.

Stabilization clauses with respect to taxes depend on the level of the public party to the SZPK. Should the agreement be concluded at the regional level, the stabilization clause would cover property tax and transport tax (payable to the regional budget). Should Russia together with the region be the party to the SZPK, the stabilization clause would also apply to profit tax, VAT and any new taxes that may be introduced.

The term of the stabilization clause varies depending on the amount of investment from 6 years for investments that do not exceed 5 billion rubles to 20 years for investments amounting to 10 billion rubles and more. Under certain circumstances, this period may be extended for 6 additional years.

Please note that the acts changing the legislation regarding taxes, increasing the rates of export customs duties and changing state support measures shall not apply throughout the period provided for by the SZPK, while the stabilization clause in relation to other acts shall be valid only within 3 years from the date of their entry into force.

As part of the implementation of the SZPK law, the Prime Minister of Russia signed two government decrees which are the most important by-laws that make it technically possible for the SZPKs to be implemented.

The first approves the rules for concluding the SZPKs with the investors, its standard form, terms and conditions of amendment and termination[4]. The Ministry of Economic Development will have the right to sign the SZPKs on behalf of the state.

The second determines the procedure for providing compensations for the construction of additional infrastructure - the costs of building and modernizing transport, energy, utilities and information systems necessary for the successful launch of investment projects[5]. In addition, the federal budget will reimburse the interest on loans and coupon income on bonded loans attracted for investment purposes. Reimbursement of costs is estimated to take from 5 to 11 years depending on the type of infrastructure facility and the terms of the agreement. The maximum amount of reimbursable costs indicated above cannot exceed 50 % of actual expenses incurred in connection with the supporting infrastructure and 100% of actual costs incurred for related infrastructure facilities.

Until April 2021, the system will operate in a "pilot mode" and the agreements will be signed in a paper form. Then, the "Investment" information system is expected to be launched. It will provide support to the investors through the Investment Development Agency and ensure prompt consideration of applications - up to 60 days, as well as a minimum of documentation.

Even though the said law will be beneficial for the investors who, based on different reasons, have already decided to implement their projects in Russia, it could hardly attract new investors since:

i. (i) it does not provide for new tax benefits or incentives for investors (e.g. reduced tax rates, tax holidays) and infrastructure compensations seem to be lasting in time;

ii. (ii) the liability of the public party or parties to a SZPK is generally limited to compensation for actual damage incurred by an investor due to non-compliance of the public party with its obligations under a SZPK (i.e. improper calculation of taxes, application of laws that shall not be applied according to a SZPK). Compensation for lost profit and application of penalties would not be available for an investor;

iii. (iii) the stabilization clause does not apply to any new taxes that might replace those specifically mentioned in the agreement;

iv. (iv) it is not clear enough whether the investor could conclude a SZPK and enter into an investment agreement offering regional tax benefits.

1 *Federal Law dated 01.04.2020 No. 69-FZ "On the protection and promotion of investment", art. 7, 8*
2 *Federal Law dated 01.04.2020 No. 69-FZ "On the protection and promotion of investment", art. 6*
3 *Federal Law dated 01.04.2020 No. 69-FZ "On the protection and promotion of investment", art. 9*
4 *Decree of the Government of Russia dated 01.10.2020 No. 1577*
5 *Decree of the Government of Russia dated 03.10.2020 No. 1599*

II. IMPROVEMENT OF BUSINESS ENVIRONMENT

For a long time, Russia was known for its particularly long and cumbersome procedures and requirements in almost all the spheres of business activity.

However, things surprisingly changed with the beginning of the digital era in Russia.

Over the last years, Russian business community evidences progressive digitalization and simplification of bureaucratic formalities: from registration of the companies to obtaining necessary authorizations and licenses, tax reporting and customs clearance procedures. Paper work is progressively replaced with electronic exchange of documents and filing systems. Interaction with the state authorities becomes more transparent and predictable. "One window" system is implemented for different kinds of applications and services to be rendered by the state.

Russian currency control regulation is progressively liberalized and switches from restrictive to risk-oriented approach. Risk-management systems implemented by the tax and customs authorities allow to decrease the number of unjustified controls and speed up the procedures.

Russian government is interested in setting up a clear legislative perimeter for business activities, namely, with the help of the "Regulatory Guillotine" which is a tool for large-scale revision of current legislation and cancellation of regulatory legal acts that negatively affect the general business climate and regulatory environment. The goal of the "regulatory guillotine" is a total revision of mandatory requirements with an active participation of the business and expert communities. Implementation of "regulatory guillotine" should result into the creation of a new comprehensive system of clear requirements for business entities in all areas of regulation, the removal of the excessive administrative burden on business entities, including the elimination of redundant, outdated and conflicting requirements contained in regulatory legal acts, and the decrease in related risks.

"Business Climate Transformation" is a new mechanism for managing systemic changes in the business environment and a "living" tool that should provide with the maximum feedback from the business. It implies most active involvement of the business community in shaping the reform agenda: from identifying existing problems of doing business in various industries, forming ways to solve them, to assessing the quality of the work of government bodies.

"Business Climate Transformation" allows to accumulate all the initiatives to improve the business environment in a single document, which will ensure comprehensive coordination and control over the implementation of reforms. Road maps approved within the framework of this mechanism are updated on an ongoing basis - twice a year - in order to promptly respond to changes in the macroeconomic situation and the priorities of the business community.

Recently, the road map was approved for export operations. It includes measures aimed at modernizing state support of export companies, liberalizing currency regulation, reducing customs duties on foreign equipment and raw materials required for the production of export-oriented goods, digitalizing export procedures, and a number of other initiatives.

III. STRUGGLE WITH TAX EVASION

Traditional cross-border structuring of investment projects in Russia through tax friendly jurisdictions including Cyprus, Malta, Luxembourg and the Netherlands should lose their attraction due to renegotiation of the DTTs with these countries. The list of countries might be further extended to other jurisdictions like Switzerland and Hongkong.

Renegotiation is completed with Cyprus, Malta and Luxembourg, updated rates coming into force on January 01, 2021. This would affect most of the existing holding structures. Renegotiation with the Netherlands seems to be tough. For the moment, the interest of both parties in reaching a mutually acceptable solution has not been exhausted.

The Russian government wishes to introduce a 15% withholding tax on outbound payments of dividends and interest from Russia to the abovementioned countries. Preferential rate of 5% would be retained, however, with respect to dividends and interest paid to institutional investors and public companies with at least 15% of shares in free float, subject to the minimum 15% direct shareholding requirement and the minimum 1-year holding period as well as interest paid under government bonds, corporate bonds and Eurobonds listed on a stock exchange.

Considering that combatting artificial structures created with the sole or main aim of tax optimization or tax evasion will remain one of the key objectives of the development of tax legislation and corporate practice in Russia, setting up holding structures of extra complexity would not be of particular interest.

Moreover, in 2021 Russia will start full-scope application of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (known, in international practice, as the "Multilateral Instrument" or "MLI") with 27 jurisdictions. Its application will be limited to withholding taxes in relation to Cyprus, Czech Republic, Indonesia, Kazakhstan, Korea, Portugal and Saudi Arabia until 2022. The principal purpose test (PPT) will be implemented when deciding whether DTT benefits should be granted (with a small number of countries Russia will also apply simplified limitation of benefits provision). Under the PPT, the benefits arising out of a DTT shall not be granted if the application of such benefits was one of the main objectives of any structure or transaction.

In this respect, new cross-border structures should comply with real economic substance of the project.

Under these circumstances, optimization of the project's tax burden in Russia (via optimization of expenses deductibility and effective profit tax and VAT rates, regional incentives, subsidies, etc.) may become of crucial importance.

CONCLUSION

At present, legislative framework of investment activities becomes more transparent and easier to comply with. Excessive bureaucratic formalities and procedures are progressively levied.

However, financial and tax incentives offered to the investors seem to be insufficient. Furthermore, worldwide fight against tax evasion and tax basis erosion, which became a current trend in Russia, cannot be ignored and require more sophisticated structuring of holdings and financial flows.

MOROCCO

ABOUT NAZALI MOROCCO

Started providing services in January 2020 at Casablanca office, Nevados Morocco Consultancy Sarl Au is one of the first abroad offices of NAZALI.

With its sound experience in tax and legal area, NAZALI Morocco team works with many local and international companies in the field of, amongst others: Tax, Legal, Accounting, Corporate Governance, Customs, Foreign Exchange Office, Litigations and M&A.

NAZALI Morocco aims to collaborate with clients closely in country's challenging tax and legal environment so they can concentrate on their daily business activities in the market. NAZALI provides assistance to the clients in a comprehensive way of whole regulations to assure that necessary measures have been taken on time as well as corrective actions on ongoing issues.

NAZALI Morocco is headed by Ms. Esma Parmak Kahraman as a Partner and Managing Director. Esma is an expert in taxation, financial reporting and audit and has gained a considerable experience in local and international taxation, tax inspection, transfer pricing and audit in different countries. With her knowledge on Morocco and Algeria and with her experienced tax and legal teams, Esma is assisting local and international companies for their investment journey in Morocco, from company set-up to investment planning, mergers and acquisitions, tax inspections and day-to-day businesses. Esma is a Certified Public Accountant, Independent Auditor and has a Certificate of Risk Management Assurance (CRMA).

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CURRENT NEWS ABOUT MOROCCO

» Morocco definitely out of the European Union's (EU) 'Grey List'

The Finance Laws introduced by Morocco for 2020 and 2021 brought amendments to the tax regime applied to the financial hub, Casablanca Finance City to make it in line with the principles of fair tax competition. Morocco has also reformed two preferential tax regimes relating to free zones and export companies in order to be compliant with EU standards.

» Morocco's agreements with Israel

Morocco and Israel signed four agreements in sevral fields:

- An agreement on the exemption from visa formalities for holders of diplomatic and service passports,
- A memorandum of understanding in the field of Civil Aviation,
- A memorandum of understanding on the innovation and the development of water resources.
- A memorandum of understanding on cooperatiojn in the field of Finance and Investment.

» Mohammed VI Investment Fund

This fund of an initial budget of 45 Billion dirhams (Approximatly 4,2 Billion EURO) will be dedicated mainly for the financing of investment projects.

It will contribute directly to the capital of some public and private companies. Its mission is also to prepare and implement financing mechanisms for VSEs and SMEs.

» Crowdfunding in Morocco

On February 10th, 2021, the Moroccan House of Representatives has unanimously adopted the law on crowdfunding. This legal framework aims to mobilize additional funding sources mainly for VSEs and start-ups.

» The medical and therapeutic using of Cannabis

The Government of Morocco studies a bill about the legalization of the cultivation of cannabis and the modes of its use for medical and therapeutic purposes.

» WHO congratulates Morocco on Covid-19 vaccination campaign

"Morocco is among the top 10 countries which have successfully completed the Covid-19 vaccination challenge," the World Health Organization (WHO) office in Morocco tweeted this March 2nd, 2021.

» The African Continental Free Trade Area (ZLECAf)

This African Continental Free Trade Area will allow companies established in Morocco to lower the costs of importation of certain raw materials used as a basis for certain industries.

MOROCCO: ELECTRONIC SIGNATURE: CREATION AND PROBATIVE FORCE

OVERVIEW UPON PROVISIONS OF LAWS N° 53-05 AND N° 43-20

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Legal Consultant

ABSTRACT

Electronic signature, when made under certain conditions, has in Moroccan law the same legal value as the handwritten one. Adopting law n° 43-20 will make it possible to further secure electronic exchanges and promote online signatures. How electronic signature is operated and what tools are in place to secure the electronic signature.

Key Words: Consent, Identification, Accredited, Unlicensed.

INTRODUCTION

Aware of its commitments under international conventions, and in order to be aligned with partner countries, Morocco has enacted for more than a decade a series of laws relating to the Moroccan daily life's dematerialization.

Among these measures:

Law n° 07-03 supplementing penal code with regard to offences relating to automated data processing systems,

- Law n° 09-08 relating to individuals protection with regard to personal data processing,
- Law n° 53.05 on electronic legal data exchange,
- Law n° 05.20 on Cybersecurity,
- Law n° 43-20 relating to electronic transactions' trust services.

Whereas until recently Moroccan operators have remained faithful to the traditional handwritten signature put on paper, requiring signature legalization, the COVID 19 pandemic and the resulting constraints, including borders closures and travel restrictions, have actively highlighted this traditional mode limitations, and have led the business community to consider electronic signatures as a mean of concluding contracts.

All documents can be electronically signed except those expressly excluded by Law:

- Notarial deeds,
- Acts relating to the application of the Family Code provisions of the Family Code and private deeds relating to personal or real securities, of a civil or commercial nature.,
- Acts which haves cross-border implications requiring a handwritten signature on paper.

Likewise, the low level of this new signature process use, does not allow to get an idea of how courts will react to disputes that may arise from It.

In other words, this unprecedented crisis highlighted how important this technology is, which had already get started to be deployed sometimes ago. Moreover, the Law n° 43-20 was unanimously voted by both chambers of the Moroccan Parliament on December 8 and 15, 2020.

And that is where the importance of our study lies, which aims to address the issue of electronic signature effect in Moroccan legislation, how it is made and what effects does it generate.

I. THE IMPLEMENTATION OF AN ELECTRONIC SIGNATURE

Barid Al-Maghrib (Morocco's Post Office) is the unique authorized operator to issue electronic certifications.

Indeed, Barid e-Sign is the first platform to generate electronic certificates whose mission is to produce certificates of strong authentication, secure signature and time stamping, allowing users to put their signatures on any kind of electronic exchange with the same probative value as handwritten signatures.

The user wishing to set up an electronic signature is required to submit to Barid e-Sign the appropriate application forms. The latter provides a Certified Device, which takes the form of an encrypted USB key or a smart card which contains a software allowing the issuance of a secure electronic certificate and, thus, the realization of secure electronic signature.

Electronic signature process does legally involve third parties who play a key role either in ensuring signature's credibility and guaranteeing its validity, as well in ensuring signed document conservation and its restitution.

For this purpose, Law n° 43-20, appropriately named "Electronic transactions' trust services" sets up rules that apply to both trust services and to providers who provide them. Thus, all trust services providers are subject to safety and responsibility requirements for their activities and their services.

Electronic signature should be provided by an accredited trust service provider, endowed with the legal capacity of a company incorporated under Moroccan law, and guaranteeing systems, equipment and applications used reliability.

Trust in electronic signature involves therefor three parties' intervention and playing three distinct roles that contribute to trust:

- The signer,
- The trust service provider,
- and the recipient ("the Party who trust").

The accredited trust service provider as a key party should meet the criteria and conditions set by Law n° 43.20 in particular in Article 33 and by Specifications established by the national trust authority relating to electronic transactions. They are categorized according to the certification they provide :

- Simple level
- Advanced level
- Qualified level

Cryptology Control has likely been limited to what is to interfere with defense interests and state security preservation.

II. VALIDITY AND PROBATIVE FORCE

Signing a deed is an expression of signatory's consent to its contents. However, it is useful to point out that agreements, except for certain one explicitly provided for by the legislation in force[1], are perfectly valid as soon as consent is exchanged, whether verbally or in writing. Written form is recommended because, allows proving commitments made existence.

The Moroccan DOC[2] in its Article 417-1, explicitly and clearly provides that deeds made on electronic support have the same probative force as those made on paper. They will be admitted as an evidence in the same way as the document made on paper, provided that:

- The signee can be duly identified as the person from whom it emanates,
- And that it is established and stored under conditions which guarantee its integrity.

Article 417-2, paragraph 2 defines that an electronic signature, required to generate a "perfect legal act", requires using a reliable

1 *Journalist's employment contract for example*
In accordance with article 14 of Law n ° 89-13 relating to professional journalists' status
2 *The Dahir of Obligations and Contracts (DOC) published in Official Gazette of September the 12th, 1913. It is the equivalent to the Civil Code*

identification process guaranteeing that the said signature is linked with deed to which it is attached.

Article 417-3 provides that an electronic signature process reliability is presumed, until the contrary is proved, when this process implements a secure electronic signature.

An electronic signature is considered secure when it is created, signatory's identity insured and legal deed's integrity guaranteed, under relevant legislation and regulations provisions. Any document on which a secure electronic signature is put and which is time-stamped has the same probative value as the deed whose signature is legalized and made of certain date. The Article 6 of Law n° 53-05 relating to legal data electronic exchange, requires fulfilling three conditions for a secure electronic signature:

- Electronic Signature should be proper to the signatory,
- Electronic Signature should be created by a mean allowing signatory to keep electronic signature under his exclusive control
- Electronic Signature should guarantee that any subsequent modification indeed to which It is attached, is detectable
- The Law 43-20 on trust services for electronic transactions, which will come into force as soon as these implementing decrees are published, amended Law 53-05, repealing the Preliminary Chapter and Chapter 2.

Same as European regulations, Law n° 43-20 helped to overcome various legal obstacles to digital trust market development in Morocco.

this law is certainly a securing agent, as It makes electronic transactions more reliable, and a booster factor of this mode of concluding transactions use, as this law offers three types signatures' levels: "simple", "Advanced" and "qualified"

This new legal framework makes it possible to meet legal constraints for each type of transaction, and to cover most needs to ensure its widespread adoption.

The Simple level: for simplified use, no specific technical or functional requirements. Without reliability presumption, the burden of proof is on the defendant.

The Advanced level: necessitates intermediate technical and organizational requirements (including an electronic certificate use), which are more flexible than qualified signatures. This so-called "Advanced" signature is useful for the development of medium stake use. It does not give a presumption of reliability, the burden of proof is on the defendant.

The Qualified level: This level is more demanding than the two previous levels, It requires compulsory use of cryptography products and of a qualified electronic certificate. It benefits from reliability presumption, since it contains "secured" signature characteristics.

Complementary trust services shall be upgraded with this law application texts' publication of. These include electronic signatures' validation and conservation of, electronic stamps, electronic timestamps, electronic registered mail services and website authentication.

CONCLUSION

Considering, the low level of this new signature process use, does not allow to get an idea of how courts will react to disputes that may arise from It. It becomes important to make sure that following concepts are well defined in the agreement:

The moment and place of contract birth, as parties will not sign It face to face.

The jurisdiction and law ruling the contract and competent courts. This is a main mention to insert in the contract to avoid interpretation issues

INVESTING IN MOROCCO: WHY CHOOSE MOROCCO? WHERE TO ESTABLISH YOUR INDUSTRIAL UNIT? HOW TO FINANCE YOUR INVESTMENT?

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ABSTRACT

Facilitating the establishment of foreign investors in Morocco has been declared as a key objective of the Kingdom.

In order to achieve this objective, Morocco has made serious efforts in terms of downstream investment (infrastructure, training of human resources, etc.).

Currently, Morocco is more open than ever to all kinds of investments and set up a whole legal and subsidizing arsenal to succeed the establishment in the Kingdom.

Key Words: Investment, Trade Agreements, Infrastructure, Industrial Zones, Tax Advantages, Subsidies.

INTRODUCTION

Benefiting from a strategic position by reason of its proximity to the European coast, Morocco is nowadays considered as an investment bridge connecting the European continent to Africa. This position represents the culmination of the intense and steady efforts undertaken by the Kingdom to develop its international trade through the optimization of its logistical chain and the signature of numerous international agreements and conventions with multiple of countries. Furthermore, the country pays particular attention to the improvement of the business and investment's legal environment by constantly amending its laws and regulations in order to adapt them to the international context. The quality of its human capital and the strong involvement of the Moroccan banks throughout the African continent, are further factors making the country attractive to foreign investors.

For the purpose of increasing its attractiveness, and in order to meet the current and future international demand, Morocco keeps making substantial efforts to promote and facilitate investments. Indeed, the Kingdom keeps introducing new Industrial Acceleration Zones (formerly named Free zones) in order to provide investors with a flexible environment, the most recent one being inaugurated in Agadir earlier this month. The country also continuously develops mechanisms to participate in the financing of industrial projects, an array of investment advantages is provided in this regard. Furthermore, partial financing plans and training aids are put in place to encourage investors and relieve them of the cost of investment and workforce training in the event that an adjustment of profiles to the specificities of vacancies is necessary.

In the present article, we will expose key indicators about the Kingdom of Morocco, and also introduce offered investment facilities by illustrating fundamental information about the industrial acceleration zones available in the country, and the financial incentives provided for by the Government.

KEY REASONS TO INVEST IN MOROCCO:

- **Stability**

Morocco enjoys a stable economic and political climate, confirmed in the 2021 edition of the risk maps issued by the risk valuation firm ControlRisks, which considers the Kingdom as one of the safest countries in North Africa from a political point of view. With regards to security risk, ControlRisks describes it as being low in Morocco, categorizing herewith the country alongside very developed countries such as the United States, the United Kingdom and Canada. Furthermore, ControlRisks attests that the maritime risks of piracy, criminality, conflict, territorial disputes, terrorism and militancy are very low in the Moroccan coast.

- **Infrastructure**

Thanks to the heavy investments made by the country in order to raise motorway, rail and port infrastructure to international standards, Morocco holds today a modern infrastructure. Indeed, in terms of maritime connectivity, the Kingdom placed itself in the 22nd position in 2019[1], and is connected to 186 ports around the world[2]. With regards to air connections, the country possesses 19 international airports[3]. The road network is also a significant asset for the country. Indeed, according to the data published on the Moroccan Equipment Ministry's website, 44.180 km of the roads are paved.

- **Availability of multiple trade agreements**

Morocco has concluded free trade agreements with more than 100 countries, thus giving its products access to a wide market. Indeed, the Kingdom has signed bilateral treaties with countries like the United States, Turkey, Jordan and United Arab Emirates. Morocco also has an association agreement concluded with the European Union and a multilateral agreement signed with Arab-Mediterranean countries (Agadir agreement).

Source: Moroccan Investment and Exports Development Agency

PRESENTATION OF THE INDUSTRIAL ZONES AVAILABLE IN MOROCCO:

In order to guarantee a better installation for foreign investors in the country, Morocco has set up a vast range of industrial acceleration zones (formerly named free zones) spread over the entire territory of the Kingdom, which grant the established companies various advantages. A non-exhaustive list includes:

- Total exemption from Corporate Income Tax (CIT) during the first five consecutive years following the date of commencement of their operations; and a taxation at the specific rate of 15% beyond this period.

- Exemption from withholding tax of dividends originating from activities carried out in industrial acceleration zones, which are paid to non-residents.

- Exemption from VAT with right of deduction for operations carried out inside or between industrial acceleration zones;

- Exemption from registration fees applicable to acts of incorporation and capital

1 *Moroccan Investment and Exports Development Agency (AMDIE), Booklet Morocco now, Investment and export, p. 14.*
2 *ibid, p.14.*
3 *ibid, p.14.*

increase, as well as to acquisition of the necessary land for the realization of the company's investment project.

- Exemption from professional tax for the first 15 years consecutive to their operation;

- Facilitation of the foreign exchange transfer abroad for incomes generated by foreign investments made in Morocco, such as dividends and interests generated by shareholders' loans.

- Special customs regime allowing the companies located in industrial acceleration zones to benefit from various advantages, mainly the exemption of the goods entering or leaving free export zones, as well as those obtained or staying there, from all duties, taxes or surcharges on import, circulation, consumption, production or export.

Morocco keeps also widening its offer of industrial parks, which are located all over the country, some of them are even categorized by type of activity.

A summary[4] of the useful information on the most important industrial acceleration zones and industrial parks, illustrating the positioning and proximity to basic infrastructures, are presented in the appendices 1 and 2.

PRESENTATION OF THE SUBSIDIES, FINANCING PLANS AND TAX BENEFITS OF WHICH INVESTORS CAN BENEFIT IN MOROCCO:

With regards to the financing of investments, Morocco has subsidy funds, the Kingdom also provides financing plans and grants tax advantages. A non-exhaustive list is presented below:

- **Industrial Development and Investment Fund (FDII):** Companies can benefit from a subsidy for tangible and intangible investment that can be up to 30% of the investment's amount excluding taxes;

- **Morocco PME:**

» ISTITMAR CROISSANCE program for VSEs: Support for extension and diversification projects that can reach 30% of the investment's amount capped at 2 Mn MAD, for very small businesses having achieved or forecasted a turnover less than or equal to 10 Mn MAD.

» IMTIAZ CROISSANCE program for SMEs: support for extension and diversification projects that can be up to 20% of the investment program, capped at 10 Mn MAD, for small business which carried out or forecasted turnover does not exceed 200Mn MAD.

- **Investment Promotion Fund (FPI):**

This fund manages the operations relating to the assumption of certain advantages by the Government granted to companies which investments respect the conditions set forth in the investment charter:

- Support for the acquisition of a land in specific areas up to 20% of the purchase cost.

- Participation in external infrastructure expenses up to a limit of 5% of the investment program's total amount.

- Contribution to training costs up to a limit of 20% of the incurred expenses.

- **Finishing, Printing, Dyeing Fund (FIT):**

This fund grants a 20% premium on equipment investment dedicated to upstream textile projects.

- **"IDMAJ" program:**

This program aims to promote recruiting young graduates by granting companies offering a first professional experience the exemption from social contributions and payroll taxes.

4 *Moroccan Ministry of the Economy Industry and Trade (MMEIT), Project files of acceleration of the internal market.*

- **"TAEHIL" program:**

This program offers trainings to future hired employees and job seekers in order adjust their profiles to the specificities of the position to be filled and to the market's requirements.

- **"INMAA" program:**

This program aims to improve the industrial performance and the competitiveness of Moroccan industries by providing their teams training and support in Lean management for the implementation of Lean tools. The cost of this service can be subsidized up to 60% through the MOUSSANADA program.

- **Value Added Tax (VAT) exemption[5]:**

Companies established in Morocco can benefit from the exemption or reimbursement of the VAT provided for by the Moroccan Tax Code, in the event of:

- Local acquisition of import of investment goods within the limit of 36 months starting from the beginning of the company's activity.

- Import of the capital goods, materials and tools necessary for the completion of investment projects undertaken within the framework of an agreement concluded with the State under certain conditions.

- Existence of a VAT credit arising from the acquisition of certain investment goods that could not be absorbed by the collected tax.

Corporate Income Tax (CIT) exemption:[6]

Industrial companies operating in activities included in the list provided for by the Government benefit from the advantages below:

- Total exemption from CIT for the first five consecutive fiscal years starting from the date the company starts operating.

- Application of a reduced tax rate of 28% to the local turnover carried out by industrial companies specialized in manufacturing or transforming tangible personal property and which tax result is less than MAD 100M (Approx EUR 9M).

- **Professional tax:**

Companies established in Morocco exercising a professional, industrial or commercial activity benefit from the exemption from professional tax during the first 5 years of operation[7]. The aforementioned exemption also applies, for the same duration, to lands, buildings of any kind, additions to buildings, new equipment and tools acquired during operation, directly or by way of leasing.

CONCLUSION

The current Covid-19 crisis has brought important learning to the Kingdom, which is adopting a new policy aiming to substitute the importations by the local production. In order to encourage the domestic industries, the country has recently increased the custom duties applicable to a range of imported finished products and is strengthening its support for industrial enterprises. In this context, a study conducted by NAZALI based on project fiches published by the Moroccan Ministry of Industry, Trade, Green and Digital economy has shown that the country presents interesting industrial investment opportunities.

5 *Moroccan Tax Code (MTC), the 123th-22 article.*
6 *MTC, ibid, the 6th-I-B-6 article.*
7 *Moroccan tax Code of Local Collectivities, the 6th -II-1 article.*

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APPENDICES

APPENDIX NO:1

Element		Jorf lasfer	Tetouanparc	Ecoparc Berrechid	Settapark
Presentation		It is intended to house, the activities of first category type chemistry and parachemistry and present to investors operating in the industrial sector an adequate environment for the realization of their projects, with quality infrastructure and connectivity optimal to the city of El Jadida.	It presents to investors operating in the industrial sector, an adequate environment for the achievement of their projects, with quality infrastructures, optimal connectivity, proximity to the city of Tetouan and the availability of a basin important job. A new tranche of 35 ha is being launched.	It presents to investors operating in the industrial sector an adequate environment for the achievement of their projects, with quality infrastructure and important advantages, in particular, competitive prices, a diversified commercial offer (rental of land / buildings).	It presents to investors operating in the industrial sector a suitable environment for carrying out their projects, with quality infrastructure and important advantages, including attractive commercial offer, connectivity optimal, proximity to the towns of Settat and Casablanca and the availability of a basin important job.
Region		CASABLANCA-SETTAT	Tanger-Tetouane-AlHoceima	Casablanca-Settat	Casablanca-Settat
Creation		2009	2009	2014	2013
Nearby infrastructure		Railroad tracks along the project	Tangier Med station at 60 km	Berrechid station at 8,1km	Settat station at 3km
		Mohamed V Airport 127 km	Tetouan Airport 20min	Mohamed V Airport 26 km	Mohamed V Airport 40 km
		A5 Highways 27 km	A4 Highways 30 km	A7 Highways 12km	RN9 0km
		National road RN 301 going through the project	2x2 expressway bordering the site The National road RN2 at 2 km	National road RN 9 at 8,4 km	RN9 0km
		Port of EL Jadida within of the project	Tanger Med Port at 60 km	CasaPort at 47km	CasaPort at 60km
services and equipment available		✔		✔	✔
		✔	✔	✔	✔
		✔	✔	✔	✔
		✔	✔	✔	✔
		✔			
		✔	✔	✔	✔
			✔		
			✔		

NAZALI GLOBAL MAGAZINE

APPENDIX NO:2

Element		Ain johra	Selouane	MIDPARRC	Agropole Beni Mellal
Presentation		It presents to investors operating in the industrial sector a suitable environment for carrying out their projects, with quality infrastructure and important advantages, including attractive commercial offer (rental of land at competitive prices), connectivity optimal, proximity to the towns of Settat and Casablanca and the availability of a basin important job.	It presents to investors operating in the industrial sector an environment adequate for the realization of their projects, with quality infrastructure and connectivity optimal to the city of Nador.	It presents to operating investors, mainly, in the aeronautical sector a suitable environment for carrying out their projects, with quality infrastructure and important advantages, in particular, the free zone status, a one-stop shop, its connectivity and its proximity to training centres dedicated to the aeronautics and Med V.	This industrial park presents to operating investors, mainly in the agrifood sector an adequate environment for the achievement of their projects, with quality infrastructure and important advantages, including the site connectivity and proximity to a basin important job.
Region		Rabat-Salé-Kenitra	Oriental	Casablanca-Settat	Beni Mellal-Kenifra
Creation		2011	2011	2011	2018
Nearby infrastructure		Rabat station at 50km	Selouane station at 1km	Airport Station 2km	Khouribga Station 87km
		Rabat Sale Airport 42,3km	Nador Al Aroui 15km	Mohamed V Airport 2km	Beni Mellal Airport 16km
		A2 Highways 6km	A2 Highways 82km	A7 Highways 8km	A8 Highways 17km
		RN6 0km	RN2 0km	RN9 2,5km	RN8 0,8km
		CasaPort at 147 Km	Beni Ansar Port at 20km	CasaPort at 30km	CasaPort at 236km
services and equipment available		✔	✔	✔	✔
		✔	✔	✔	✔
		✔	✔	✔	✔
		✔			✔
		✔	✔	✔	
		✔	✔	✔	✔
				✔	
			✔	✔	
				✔	
			✔	✔	
			✔	✔	

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APPENDIX NO:2

Element		ZI Boujdour	Free zone Tanger	Atlantic Free Zone P2I	Technopolis (ZAI)	Souss Massa (ZAI)
Presentation		The ZI intended to develop economic activities, in connection with the new port of Boujdour, promoting products from the sea of the region Laâyoune-Boujdour-Sakia Al Hamra and support the dynamics of development of the region.	It presents to investors with a suitable environment for carrying out their projects, with quality infrastructure and important advantages, in particular, the free zone status, a one-stop shop, a diversified commercial offer and proximity to city of Tangier.	It presents to operating investors, in particular, in the automotive sector an environment adequate for the realization of their projects, with quality infrastructures and advantages important, in particular, the zone status frank, a diversified commercial offer and a optimal connection to the Highways. She accomodates also an industrial acceleration zone	It presents to operating investors, mainly, in industries technology with high added value, a suitable environment for carrying out their projects, with quality infrastructure and significant advantages, including a one-stop shop, a commercial offer diverse.	It presents to investors with an environment adequate for the realization of their projects, with quality infrastructures and advantages important, in particular, the zone status straightforward, a one-stop shop, an offer diversified commercial and proximity to the city from Tangier.
Region		Laayoune-Boujdour-Sakia al Hamra	Tanger-Tetouane-AlHoceima	Rabat-Salé-Kenitra	Rabat-Salé-Kenitra	Souss Massa Daraa
Creation		2013	1999	2010	2016	Juin 2020
Nearby infrastructure			Tanger city Station to 12km	0 km (Railroad Kenitra-Sidi Kacem)	Rabat station 20km	Marrakech Station 224km
		Laâyoune V Airport to 187 km	Tangier airport to 3km	Rabat Sale Airport 50km	Rabat Sale Airport 10km	El Massira Airport in Agadir 24km
			A1 Highways 5 km away	A1 Highways 14 km away	A1 Highways 0km	Agadir/ Marrakech Highways 0km
		National road RN 1 to 3 km	The National road RN1 cross the site	0Km (RN4)		0Km (RN8)
		0 km to Boujdour's Port	Tanger Med Port at 56km	Casaport at 160km	Casaport at 122km	Agadir Port at 27km
services and equipment available				✔	✔	✔
		✔	✔	✔	✔	✔
		✔	✔	✔	✔	✔
		✔	✔	✔	✔	✔
		✔				✔
		✔	✔	✔	✔	✔
			✔			
			✔	✔	✔	✔
			✔			

KEYS

Meanning	Train Station	Airport	Motorway	National Road	Port	Drinking Water Source	Multiservices center	Restaurant	Security Poste	Mosque	Training Center	Closed Zone	Postal agency	one stop shop	Hotel	Industrial association	Service Station	Fire station	Closed Zone	Service Station

UKRAINE

ABOUT NAZALI UKRAINE

September 2020 marked NAZALI's presence in Ukraine as Kyiv office was opened.

For the past couple of years, Turkey has become one of the biggest trade partners of Ukraine. Turkish companies are actively investing in the Ukrainian market, especially in energy, infrastructure, construction, transport and agriculture sectors. Therefore, an availability of a reliable partner, which could guide the foreign investors through the constantly changing business environment, appears to be one of the key elements necessary to succeed in Ukraine.

At NAZALI Ukraine, we exercise strategic approach to deliver distinctively high degree of quality to resolve any legal challenges in the most efficient manner.

The main difference which makes NAZALI stand out from the rest of the Ukrainian market consultants is that we not only provide regular legal advice but also render services in the fields of tax, accounting and customs. The Ukraine's team is ready to provide high-quality consultancy services to all types of clients, which require provision of target-oriented solutions with consideration of each particular business strategies and work necessities.

NAZALI Ukraine's office is led by Mr Doğus Gulpinar, who previously advised foreign investors as a private practitioner, and later oversaw the Turkish desk in a reputable Ukrainian law firm. Mr Gulpinar's experience includes provision of legal services in the areas of energy, construction, real estate, and immigration law. Our mission, according to Mr Gulpinar, is not only to advise Turkish clients in Ukraine, but also to provide an opportunity to the local companies to commence their business in Turkey, as well as in other countries of NAZALI's presence.

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CURRENT NEWS ABOUT UKRAINE

» Ukraine welcomes big investors

Ukraine has recently made a new step towards the attraction of significant foreign investments. Yesterday, President Zelenskyi signed a new law "On State Support for Investment Projects with Significant Investments" which introduces state support to large investors who are ready to invest over EUR 20 million to certain sectors.

» New investment opportunities in the natural resources sector

On January 26, 2021, the Ukrainian Geologic and Subsoil Service of Ukraine and Investment Promotion Office 'UkraineInvest' jointly presented new investment opportunities in the natural resources sector of Ukraine, namely the list of strategic and critical minerals that can be bought at electronic auctions. Their extraction and development can bring more than $10 billion of investments to the country.

» United Arab Emirates and Ukraine's representatives sign memoranda and agreements amounting to USD 3 billion

As part of the official visit of Ukrainian President Volodymyr Zelensky to the United Arab Emirates, the Ukrainian delegation signed a number of memoranda and contracts which potentially could bring around USD 3 billion of investment to Ukraine.

» Ukraine plans to raise UAH 12 bln from privatization

The State Property Fund of Ukraine (SPFU) plans to successfully implement privatization program defined by Ukrainian Government for 2021. The SPFU sets an ambitious goal to raise UAH 12 bln from privatization this year.

» Change in IT sector regulation

The Government of Ukraine adopts legislation to unlock the potential of Ukraine's IT sector including amendments to Ukrainian tax, labor, corporate, IP and law enforcement legislation.

» Ukraine becomes second in the ranking of world grain exporters

The results were announced at the 52nd session of the International Grains Council.

» Tax amnesty

Ukrainian President Volodymyr Zelensky registered two draft laws on tax amnesty in Ukraine. The bills provide for exemption from taxation of monetary assets held by Ukrainian individuals both in Ukraine and abroad that could have previously gone untaxed, subject to special one-off payments.

» Ukraine to introduce VAT on gitial services

Remote supplies of e-services by digital business (Facebook, Google) will become taxable in Ukraine.

IMPLEMENTATION OF BEPS ACTION PLAN IN UKRAINE

Mr. Vladyslav Kupriienko
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ABSTRACT

The article provides for concise yet instructive overview of the Ukraine's participation in the BEPS agenda. It examines the fulfillment of Ukraine's commitment to implement the anti-BEPS initiatives, as well as observes the way in which it was made. The article also provides for brief comments on potential effect the introduced changes might have on the existing tax practices exercised by Ukrainian enterprises and international businesses using Ukrainian jurisdiction.

Key Words: BEPS, Permanent Establishment, Transfer Pricing, Controlled Foreign Companies, Principal Purpose Test, Mutual Agreement Procedure.

INTRODUCTION

In 2013, Organization for Economic Cooperation and Development, jointly with G20 initiated Base Erosion and Profit Shifting (BEPS) Project aimed at tackling tax planning strategies that exploit loopholes and mismatches in international tax legislation to shift profits to low or no-tax jurisdictions with no genuine economic activity.[1]

The BEPS Project comprises 15 Actions, each dealing with particular abusive instruments used to avoid tax and equips governments with tools to counteract the aggressive tax planning schemes put in place by taxpayers and their advisors to avoid tax which put a strain on international fairness and competitiveness and deprive states of their fair share of tax revenues.

Almost 6 years have passed since the final BEPS reports were published and all the interested countries were encouraged to modify their both domestic tax legislation and tax treaties to factor the results of OECD and G20 work. Ukraine declared its commitment to follow the BEPS agenda and implement the proposed changes.[2]

The article provides for brief overview of Ukraine's path towards implementation of BEPS package to align its legislation with world's best practices.

CONTROLLED FOREIGN COMPANIES

BEPS Action 3 introduces a powerful mechanism that tackles tax avoidance arrangements that artificially shift profits to low-tax jurisdictions through the use of subsidiaries established therein, known as controlled foreign companies (CFC) rules.

CFC rules allow governments to tax undistributed profits of non-resident entities in the hands of resident beneficiaries. Such measures are aimed at preventing 'concealment' of profits (primarily passive-type) of international groups in jurisdictions that levy little or no tax on such profits.

Ukrainian CFC rules apply to Ukrainian resident shareholders, both incorporated entities and individuals, holding 50% of corporate interest (jointly 50% for individuals) in certain qualified non-resident entities (which apart from corporate bodies also include partnerships, trusts and funds), requiring the former to report and assess Ukrainian corporate income tax on profits earned by their subsidiaries.

1 *BEPS Actions - Developed in the context of the OECD/G20 BEPS Project, OECD website: https://www.oecd.org/tax/beps/beps-actions/*

2 *On January 1 Ukraine will join the BEPS Action Plan to tackle Tax Evasion (22 November 2016), News The Ministry of Finance of Ukraine: https://www.mof.gov.ua/en/news/-sichnia-ukraina-pryiednaietsia-do-planu--po-borotbi-z-unyknenniam-vid-opodatkuvannia*

The Ukrainian CFC rules are aimed at mobile passive-type income which is easily shifted to escape taxation in Ukraine. At the same time, the Ukrainian legislation provides for the 'safe clause' for in nature passive income which in certain cases could be regarded as active which consequently excludes such income from the scope of Ukrainian CFC rules application. That said, it could be reasonably argued that such provisions introduce a loophole which reserves possibilities for abusive techniques aimed at artificial avoiding of CFC rules application.

Ukrainian CFC rules do not apply if total annual income of all CFCs under the control of a Ukrainian resident does not exceed EUR 2 mln.

Initially scheduled to become effective on 1 January 2020, operation of Ukrainian CFC rules was postponed to 1 January 2022.

Although tax planning arrangements with the use of Ukrainian holding companies are quite uncommon, CFC rules will drastically effect tax position of Ukrainian nationals, beneficiaries of companies established in low-tax jurisdictions.

REVISED PERMANENT ESTABLISHMENT (PE) DEFINITION

Tax planning techniques employed to artificially avoid a permanent establishment status are dealt with in BEPS Action 7 which proposes changes to a permanent establishment definition to encompass activities of taxpayers that benefit from various exceptions to avoid taxable presence in a source state.

More specifically, new changes provide for special 'substance-over-form' anti-abuse rule that curtail practices whereby international businesses intentionally fragment their activities in a source state in a way that each such activity in isolation can qualify as preparatory and auxiliary ('anti-fragmentation rules'). In addition, the new rules also address the situations where taxpayers artificially split long-term contracts to make each of them not exceed 12-month period to circumvent the exception applicable to the construction site works ('anti-splitting-up' rules).

The PE definition was further extended to include the so-called 'dependent agent' PE. Under this rule, an agent acting in a source state, that habitually concludes contracts in the name of a non-resident or negotiates the terms of such contracts that are subsequently accepted by a non-resident without significant alterations, shall be deemed as constituting a PE of such a non-resident in the source state.

The definition of permanent establishment contained in the Ukrainian tax legislation was always in line with OECD standards, and has been accordingly amended to factor the BEPS agenda.[3]

All the proposed changes were incorporated by Ukraine to its tax law and are effective as of May 2020. New rules set a lower PE threshold for a non-resident that could previously conduct business activity in Ukraine without creating a taxable presence, with all relevant tax implications.

Within the Ukrainian context, newly introduced extended PE definition will prove particularly useful to catch commonplace practices exercised by Ukrainian businesses that use in their corporate structures non-resident companies established in low-tax jurisdictions (primarily, Cypriot-resident) with nominal directors. Such companies are effectively managed by Ukrainian individuals who habitually take active participation in such non-resident company's operational activity. Former permanent establishment definition seemed rather weak to counteract such abusive practices.

As of now, considerable number of tax treaties to which Ukraine is a party provide for extended PE definition. Having said that, the Ukrainian legislative definition of a permanent establishment providing could hardly be applicable to residents of states which did not respectively modified their tax treaties with Ukraine. That said, the absence of the relevant provisions in double tax treaties can be invoked as restricting application of extended Ukrainian PE definition to the residents of such states.

3 *Article 14.1.193 of the Tax Code of Ukraine (the 'TCU) (as it reads as of May 2020)*

TRANSFER PRICING

Considerable efforts of OECD and G20 working group were dedicated to transfer pricing (TP) and resulted in adoption of Action 8-10 which introduces new approach towards transfer pricing setting and assessment, and Action Plan 13 that provides for new transfer pricing filing and reporting requirements.

New legislative changes were enacted in the tax law of Ukraine that align Ukrainian transfer pricing rules with the global trends.

In particular, the Ukrainian TP rules were strengthened with the substance-over-form principle, in accordance with which the actual conduct of the parties to a transaction is to be examined.[4] In assessing whether the remuneration under the foreign economic contract is at arm's length, not just contractual provisions but assets used, functions performed, and risks assumed by each party to a transaction shall be taken into account.

Should the actual conduct of the parties differ from which is formalized in a contract, contractual distribution of functions and risks is to be disregarded.[5]

The issue of how the arm's length principle is to be implemented in transactions that involve exploitation of intangibles has been subject to particular attention. Considering the ease with which international businesses can speculate with highly mobile income generated by the use of intangible assets, an accurate assessment of each particular activities is needed to arrive at proper remuneration to be allocated to the parties involved.

In order to deal with such challenge, Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE) concept was introduced, whereby each party to the group is to be remunerated based on the particular functions performed (along with the associated assets used and risks assumed) with respect to the intangible in question.[6]

Within the Ukrainian context, DEMPE analysis may prove particularly useful in attributing profits to permanent establishments of international businesses engaged in software development activities, as their structures often involve IT engineers located in Ukraine.

In terms of TP reporting, Ukraine adopted the three-tiered transfer pricing reporting under Action Plan 13. In addition to local file, the Ukrainian companies-members of international groups will also have to submit master file and country-by-country (CbC) report, once the relevant consolidated group revenues exceed the thresholds established at the proposed by OECD level of EUR 50 mln and EUR 750 for master file and CbC, respectively.[7]

The first reporting year for master file and CbC report will be 2021.

MULTILATERAL INSTRUMENT (MLI)

On February 2019, Ukraine ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). MLI is an international treaty that provides for universal mechanism to automatically implement the treaty-related ani-abuse rules to the existing tax treaties already in place between the contracting states without the necessity to renegotiate the relevant provisions on bilateral basis.

In entering into the MLI, a contracting state negotiates its treaty position and opts for the MLI provisions that will affect the relevant tax treaties with respect to other contracting states. The majority of MLI rules are elective, however, there are two provisions that constitute the so-called 'minimum standard' which is subject to mandatory application. All double tax treaties intended to be modified by the MLI shall include the principal purpose test (PPT) and mutual agreement procedure (MAP).

The PPT deals with abusive treaty-shopping techniques and is aimed at preventing

4
5 *Article 39.2.2.10 of the TCU (as it reads as of January 2019)*
6 *Article 39.2.2.9 of the TCU (as it reads as of January 2019)*
7 *Article 39.4.7 and Article 39.4.10 of the TCU*

granting the benefits under the tax treaties (resulting in exception from taxation or reduced taxation) in situations where granting such benefits was not intended. The MAP, in its turn, addresses the situations where inappropriate taxation was to the detriment of the taxpayers, enabling them to initiate the relevant procedure to remedy such mistreatment.

Principal-purpose test (PPT)

Under the PPT, a contracting state may deny applications of benefits under the relevant tax treaties if, having considered all the relevant facts and circumstances, it could be reasonably established that one of the principal purposes of underlying arrangement or transaction was to obtain, either directly or indirectly, such treaty benefit.

That said, an international arrangement or transaction shall generally be regarded as not satisfying the principal purpose test if it would be reasonable to conclude that entering into such arrangement/ transaction cannot be substantiated by genuine economic purpose but is rather driven by tax considerations that are aimed at obtaining the treaty benefits that otherwise would not be available.

Along with the PPT introduced to the double-tax treaties through MLI mechanism, Ukraine has also incorporated it into domestic tax legislation as a specific anti-avoidance rule. Such domestic provision could potentially be invoked in curtailing treaty abuse cases with participation of entities-resident in countries which did not modified their tax treaties with Ukraine to include the PPT.

In light of the object and purpose of the double tax treaties (also embodied in the preamble wording), the latter cannot be construed as designed to facilitate tax avoidance and evasion. That said, it shall generally remain possible for a contracting state to limit availability of the relevant tax treaty benefits in certain abusive situation by applying its domestic legislation provisions.

OECD Commentaries on the Articles of the Model Tax Convention further confirm that application of domestic anti-abuse rules to prevent granting treaty benefits in inappropriate circumstances would not be conflict with the provisions of the double-tax treaties restricting the taxation rights of the relevant state, even if the relevant anti-treaty shopping provision is not included into the relevant double tax treaty.[8]

Considering the above, it could be reasonably claimed that introduction of the principal purpose test in international tax treaty network along with relevant domestic anti-abuse rule will put an end to cases of flagrant treaty abuse in cross-border transactions.

MAP

Just like principal-purpose test, provisions on mutual agreement procedure have also been introduced to the Ukrainian legislation to resolve tax disputes arising under the tax treaties.

Both residents and non-residents who deem that they have been subject to taxation not in accordance with the provisions of the relevant DTT can present the relevant case to the competent authorities of either contracting state to reach satisfactory solution.

Having said that, it has to be noted that resorts to the MAP are quite uncommon even around the world, which makes it particularly difficult to estimate how the relevant procedure will operate in Ukraine.

OTHER BEPS-RELATED PROVISIONS

Alienation of shares in real estate-rich companies. The previously existing rule that allowed the source state to tax capital gains from alienation of shares in immovable property-rich companies was strengthened by 365-day test whereby such profits become subject to taxation in Ukraine if the shares being disposed derived their value, directly or indirectly, from immovable property located in Ukraine at any date during the 365-day period prior to such alienation.[9] The relevant mechanism has also been introduced that enables to collect the Ukrainian WHT due in cas-

8 *OECD Model Tax Convention on Income and on Capital: Commentary on Article 1 para 61 and 77 (2017), Models IBFD*
9 *Item 'e' of Article 141.4.1 of the TCU (with the relevant changes effective as of July 2020)*

es of both direct and indirect alienation.[10]

Revised 'thin' capitalization rules. Specific anti-avoidance rule that limits the deductibility of base-eroding interest payments in favour of non-resident recipients in cases of substantial debt financing, which previously effected payments to related parties only, was amended and, as of 1 January 2021, is applicable to payments made in favour of all non-residents. Furthermore, the amount of interest expenses allowed as deductible is decreased from 50% to 30% of EBITDA.[11]

Introduction of constructive dividends. As of 1 January 2021, certain payments made in favour of non-residents are treated as dividend-equivalent and are, consequently subject to 15% Ukrainian WHT.[12]

CONCLUSION

Introduction by Ukraine of the world's best practices in the field of fiscal affairs will enhance its international standing, provide for higher level of tax transparency and cooperation. Adherence to strict standards aimed at fair cross-border taxation has become inextricably connected with the country's prestige as resistance to join anti-BEPS initiatives could be reasonably perceived as facilitating tax avoidance and as signs of beggar-thy-neighbor policies.

At the national level it is expected that anti-BEPS measures will result in higher level of tax revenues collection. Most importantly, new rules will provide for greater equity and equality in economic competitiveness and will align the taxpayers' position, discouraging huge companies from entering into aggressive tax planning arrangements which result in considerable tax savings, thus posing less powerful enterprises that cannot afford such complex structures at a competitive disadvantage.

10 *Art.141.4.2 of the TCU (with the relevant changes effective as of July 2020), whereby a non-resident that acquires shares in Ukrainian property-rich company from other non-resident shall register with the Ukrainian tax authorities prior to such acquisition, withhold the Ukrainian tax due and remit it to the state budget.*

11 *Article 140.1-140.3 of the TCU*

12 *Art.14.1.49 of the TCU. The relevant changes took effect on 1 January 2021.*

NAZALI GLOBAL MAGAZINE

ALL YOU NEED TO KNOW ON INFRASTRUCTURE CONSTRUCTION TENDERS IN UKRAINE

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ABSTRACT

From this article you will understand how tenders in Ukraine work, how tenders on road construction and repair are held, how non-Ukrainian companies can participate, what are the prices for road repairs, how much the Ukrainian government expects to invest in road construction, the milestones of UA infrastructure tenders and what mistakes are frequent during preparation for participation in UA tenders.

Key Words: Ukraine, Construction Tenders, Infrastructure, Auction, Licensing.

INTRODUCTION

In spring 2019 the President of Ukraine announced the launch of the "Big Construction" state infrastructure project focusing on construction and repair of roads throughout Ukraine. During 2020 major Turkish companies entered Ukrainian market to participate in tenders on different types of construction and repair services. Recently the UKRAVTODOR reported that 4 056,6 km of Ukrainian national roads have already been repaired under the Big Construction[1].

The newly adopted State Budget of Ukraine reveals, that during 2021 Ukraine plans to spend approximately UAH 64 billion on Ukrainian automobile road network and UAH 4.5 billion on State Fund of Regional Development (which administers funds for regional infrastructure projects)[2]. In addition, the Ministry of Finance of Ukraine reported, that as of the end of October 2020, UAH 16.3 billion of COVID-19 Response Fund were spent for road construction and repair, which leaves UAH 18.7 billion to spend for further infrastructure projects[3].

Such infrastructure boom presents construction business with an opportunity to gain profits while Ukraine improves its infrastructure throughout the whole state.

GENERAL SEQUENCE OF INFRASTRUCTURE CONSTRUCTION TENDERS

The most common form of infrastructure construction tender ("ICT") from state bodies is the "open bidding". The interested state body ("Client") announces information in English about planned tender on online platform https://prozorro.gov.ua/en, which provides free access to all the interested parties. Such announcement includes:

1. Location and other information about a road (its part), bridge or another infrastructure object to be constructed / repaired;
2. Expected price of work;
3. Timeframe of work delivery;
4. Final date of application with participant's tender offer;
5. Terms of payment;
6. Amount of security payment and its terms;
7. Tender documentation;
8. Minimum step of lowering the price during auction;

Any interested party including non-Ukrainian companies may participate in open bidding by submitting its' tender offers and follow certain instructions.

FORMS OF PARTICIPATION

In case a company possesses means to execute tender works solely or with sub-contractor(s), it can apply with scans of its incorporation documents. For non-resident companies legalization of documents is necessary. In case the company is willing to use a sub-contractor, who is expected to receive at least 20% of price of a tender agreement, the company shall also indicate information about such sub-contractor in its tender offer[4].

As for association of companies, non-resident company may participate in association with (a) another non-resident company(ies) or (b) with Ukrainian company.

Ukrainian law allows association of non-resident companies to participate in tenders without establishing a separate legal entity (usually in a form of consortium). In such case the tender offer of association shall include a document (agreement) proving an establishment of such association[5].

On the other hand, participation in tender as association of non-resident and Ukrainian companies requires registration of a separate legal entity in Ukraine.

TENDER DOCUMENTATION

In any tenders all requirements for potential participants are listed in tender documentation ("TD"), which is published by the Client on the date of tender announcement. TD always includes an instruction for potential participants on how to prepare their tender offers.

In TD the Client may set one or few of the following qualification criteria for potential participants:

- Minimum set of necessary equipment, technical resources and technologies;
- Availability of workers of particular qualification with the necessary experience;
- Documented experience of execution of similar agreements (works);
- Financial capability to perform works under the tender.
- The TD also includes information on:
- final date of submitting a tender offer;
- minimum duration of tender offer (not less than 90 days from the final date of application with tender offer);
- tender offer language;
- amount and terms of security payment for participants;
- demand on revealing participant's subcontractor/co-performer, who is expected to earn not less than 20% of tender price;
- description and examples of acceptable mistakes in tender offer;
- another information the Client deems necessary to include.

In case a participant needs clarifications regarding TD, it can refer to the Client via its online cabinet. Respective questions may be submitted not later than 10 days before the end of the period of submitting a tender offer. The Client is obliged to refer with an answer within 3 days. In case the Client fails to answer within 3 days the system automatically suspends a tender until the Client publishes the answer.

TENDER OFFER

Tender offer ("TO") is a set of documents and information, submitted by a participant

1 *Ukravtodor, "The Results of Construction and Repair of National Roads in 2020", Access Date: February 3, 2021, https://ukravtodor.gov.ua/press/news/rezultaty_budivnytstva_ta_remontiv_dorih_derzhavnoho_znachennia_u_2020_rotsi.html*

2 *The Law of Ukraine "On State Budget of Ukraine on 2021", https://zakon.rada.gov.ua/laws/show/1082-20#Text*

3 *The Ministry of Finance of Ukraine, "More Than Half of the Total Amount has Already Been Spent from the COVID-19 Response Fund", Access Date: February 3, 2021, https://mof.gov.ua/en/news/z_fondu_borotbi_z_covid-19_uzhe_vitracheno_ponad_polovinu_koshtiv-2508.*

4 *Art. 22, p. 2, sub-p. 18 of the Law of Ukraine "On Public Procurement".*

5 *Art. 26, p. 10 of the Law of Ukraine "On Public Procurement".*

in an online form via online platform where respective tender is held.

Usually, a potential participant has from 30 days up to few months to prepare and apply with its tender offer. Each participant may submit only one TO per tender[6].

The TO should indicate a price offer, which cannot exceed the expected price, set by the Client.

In case the TO is submitted by the non-Ukrainian company, it should include legalized Ukrainian translation of all the documents, originally concluded in another language. This issue proves to be important as on practice many foreign participants make mistakes in translation creating mismatch between translated documents and TD requirements. Such mismatch may lead to disqualification due to document's incompliance with TD.

After a TO is submitted, the system will automatically reveal it on online platform and send a respective notification to the participant.

In case it is required by the TD, the TO shall include bank guarantee, proving participant made a security payment for participation in tender.

A participant may amend the submitted TO or withdraw it without losing its security payment before the end of the period of submitting tender offers.

ASPHALT BATCH ISSUES

ICT usually requires for a participant to provide a proof that he has access to a batch plant. It is made to be sure that the winner has access to asphalt mix to perform construction works properly.

Thus, in its TD the Client usually specifies three options for a choice of participant:

1. having a batch plant in participant's ownership. In this case a participant along with his TO needs to provide scan copy of the document proving ownership of a batch plant;

2. having rented or leased batch plant. In this case participant needs to provide scan copies of lease / rental agreement, act of acceptance and a confirmation letter from an owner;

3. having supply of asphalt mix. In this case a company may participate in tender without a straight access to a batch plant. However, a participant needs to provide in his TO scan copies of asphalt mix supply agreement and guarantee letter from a supplier proving participant's capability to provide an uninterrupted supply of an asphalt mix.

Under Ukrainian legislation a batch plant should be certified according to the State Standards of Ukraine[7],[8].

SECURITY PAYMENTS

Security Payment for Tender Offer

In ICT the Client may include obligation for participants to provide security for its tender offer. As a rule, such security should be made in a form of bank guarantee from a Ukrainian bank.

The amount of security payment shall not exceed 3% of expected price of work[9]. The proof of security payment (bank guarantee) should be submitted jointly with a tender offer.

In its TD the Client always specifies amount of such security and duration of its validity.

The security payment returns to participants after the end of its duration unless:

- participant withdraws its tender offer during its validity period;
- winning participant refuses to sign agreement with the Client after the end of an auction;
- winning participant fails to promptly provide information regarding absence of reasons for disqualification;
- winning participant fails to provide security payment for execution of agreement with the Client;

If a participant met all the requirements regarding security payment return, the Client informs the bank which issued a respective guarantee and security payment transfers back to a participant. Otherwise, security payment shall be transferred to the state/local budget.

Security Payment for Tender Agreement Execution

In case it is set in the TD, after the end of auction the winner shall make a security payment for future tender agreement. Such security payment shall also be made in a form of bank guarantee. Amount of security payment is set in TD, but in any case, it cannot exceed 5% of the price of a tender agreement[10].

Such security payment shall be returned to the winner in case:

1. the winner successfully executes the works under tender agreement; or

2. the court decides that tender results or tender agreement are invalid and thus such security payment shall be returned;

3. other terms of security payment return are set by the Client in a tender agreement.

AUCTION PROCEDURE

Pre-Auction Phase

After the time for submission of TOs has ended, all TO prices are automatically revealed.

The system automatically sets time and date of an auction and analyses the prices offered by participants. Before auction begins all offered prices are revealed from the lowest to the highest.

After all the TOs are appraised, the Client evaluates the most economically efficient TO and checks if it meets the TD requirements. In case such TO is inconsistent with the TD, the Client rejects it and moves to the next most economically efficient TO.

As soon as appraisal of TOs is finished, the system publishes protocol of review of each TO. In this protocol the Client reveals which TOs were rejected / approved for participation in an auction.

The system automatically sets time and date of auction, which cannot be earlier than 5 days from the day of publishing the protocol of review.

The procedure also foresees situation with abnormally low price. The participant who submitted an abnormally low price shall explain such abnormality within 1 business day from publishing the protocol of review. In case a participant cannot explain such price, the Clint rejects it's TO[11].

Auction Phase

The tender auction is held in three phases in real-time mode. Revealed price offers are placed from the highest to the lowest without mentioning names of participants. The highest price is the starting price. Before each following phase new starting price is set depending on the previous phase bidding.

During each phase each participant may lower its price only once. The minimum lowering step may be set in percent or monetary amount.

Each participant has access via his online cabinet to information regarding its price position, prices from the highest to the lowest without names of participants.

After the end of auction, the system automatically sends notification to the winner.

6 *Art. 10, p. 1, sub-p. 1 of the Law of Ukraine "On Public Procurement".*
7 *SSU B.V.2.7.-119:2011. Asphalt concrete mixes and road and airfield asphalt concrete mix. Technical specifications. National standard of Ukraine. Kyiv, Ukraine, 2012. http://ksv.do.am/GOST/DSTY_ALL/DSTU1/dstu_b_v.2.7-119-2011.pdf*
8 *SSU B.V.2.7.-127:2015. Asphalt concrete mix and stone mastic asphalt. Technical specifications. National standard of Ukraine. Kyiv, Ukraine, 2015. https://ukravtodor.gov.ua/4489/standarty_ta_normy/dstu_b_v_2_7-127_2015_sumishi_asfaltobetonni_i_asfaltobeton_shchebenevo-mastykovi__tekhnichni_umovy/dstu_b_v_2_7-127_2015.pdf*
9 *Art. 25, p. 1, sub-p. 3 of the Law of Ukraine "On Public Procurement".*
10 *Art. 27, p. 3 of the Law of Ukraine "On Public Procurement".*
11 *Art. 29, p. 14 of the Law of Ukraine "On Public Procurement".*

CONCLUDING TENDER AGREEMENT

After the winner is evaluated, appraised and checked for compliance with TD requirements, the Client publishes his decision on intention to conclude a tender agreement.

To give participants time to appeal the tender results (if needed), the tender agreement cannot be concluded within 10 days from the date of publishment of decision on intention to conclude a tender agreement, but not later than within 20 days after such publishing. In exceptional case this term may be exceeded up to 60 days.

If any of participants submits an appeal, the term for concluding a tender agreement shall be suspended until such appeal is resolved.

Before concluding a tender agreement, the winner shall provide the Client with the proof of authority to sign an agreement and copy of a license for execution of works under the agreement (if needed).

The terms of a tender agreement shall correspond to the content of TO.

The essential provisions of ICT agreement (price, subject of agreement and terms) cannot be changed after concluding an agreement unless, inter alia[12]:

1. amount of public procurement is reduced;
2. exceeding duration of agreement validity and duration of works is necessary and is properly documented;
3. price shall be reduced due to market volatility or changes in taxes.

Information about such changes shall be published on the tender online platform.

CONCLUSION

Current Ukrainian tender legislation allows any company meeting TD requirements to participate in ICTs. Combined with a current focus of Ukrainian government on improvement of state infrastructure this provides opportunity for foreign companies to engage in ICTs, participate in a fair competition and gain profits. One of the most crucial things in order to succeed is a thorough preparation of documents and its' translation, which requires prior analysis of published TD requirements, current Ukrainian legislation and prompt reaction to competition.

12 *Art. 41, p. 5 of the Law of Ukraine "On Public Procurement".*

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